THE COURT ARBITRATION AUTHORIZATION ACT OF 1993

HEARING

BEFORE THE

SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

H.R. 1102

THE COURT ARBITRATION AUTHORIZATION ACT OF 1993

MAY 5, 1993

Serial No. 25

Printed for the use of the Committee on the Judiciary

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THE COURT ARBITRATION AUTHORIZATION ACT OF 1993

WEDNESDAY, MAY 5, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:08 a.m., in room 2237, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives William J. Hughes, Don Edwards, Carlos J. Moorhead, Howard Coble, F. James Sensenbrenner, Jr., and Bill McCollum.

Also present: Hayden W. Gregory, counsel; Edward O'Connell, assistant counsel; Phyllis Henderson, secretary; and Joseph V. Wolfe, minority counsel.

OPENING STATEMENT OF CHAIRMAN HUGHES

Mr. HUGHES. The Subcommittee on Intellectual Property and Judicial Administration will come to order.

Good morning and welcome to the hearing of the Subcommittee on Intellectual Property and Judicial Administration on H.R. 1102, the Court Arbitration Authorization Act of 1993.

In conjunction with our discussion of H.R. 1102, we will also be discussing what is happening in alternative dispute programs, generally, in the Federal courts under the aegis of the Civil Justice Reform Act of 1990.

Today's hearing is a followup to an oversight hearing we held last May. The existing authorization for pilot court-annexed arbitration expires on November 19, 1993. The purpose of last year's hearing was to begin consideration of the future of the program after that particular date.

H.R. 1102 would remove the sunset and authorize all Federal courts to adopt in their discretion local rules for arbitration to be either mandatory or voluntary.

Court-annexed arbitration is only one of a number of alternative dispute resolution programs available to the courts. We will also hear testimony today regarding other model dispute resolution programs that have grown out of the Civil Justice Reform Act of 1990, which emanated from this subcommittee.

The Federal Judicial Center completed a study of court-annexed arbitration in 10 district courts on October 4, 1991, and a copy of that report has been supplied to each of the members of the sub-

committee. That study indicated that the pilot programs in the courts were meeting their goals of first providing options to litigants; second, reducing costs and time of litigation; and, third, reducing the burdens on the courts. The report also indicated that the mandatory programs were more successful than the voluntary programs.

We will pursue with our witnesses what new information is available in this area as well as any other suggestions that they might have on alternative dispute resolution generally.

Our witnesses today are in a unique position to inform the subcommittee of these ongoing innovative activities. I would hope that they could also provide us with projections for the future as well as how best we can support them. We look forward to the testimony.

[The bill, H.R. 1102, follows:]

I

103D CONGRESS
1ST SESSION

H. R. 1102

To make permanent chapter 44 of title 28, United States Code, relating to arbitration.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 24, 1993

Mr. HUGHES (for himself and Mr. MOORHEAD) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To make permanent chapter 44 of title 28, United States Code, relating to arbitration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Court Arbitration Authorization Act of 1993".

SEC. 2. REMOVAL OF REPEAL.

Section 906 of the Judicial Improvements and Access to Justice Act (28 U.S.C. 651 note), and the item relating to such section in the table of contents contained in section 3 of such Act, are repealed.

SEC. 3. AUTHORIZATION OF APPROPRIATIONS.

Section 905 of the Judicial Improvements and Access to Justice Act (28 U.S.C. 651 note) is amended—

(1) in the first sentence by striking "for the fiscal year" and all that follows through "4 fiscal years,"; and

(2) in the third sentence by striking ", except that" and all that follows through "this Act".

SEC. 4. ARBITRATION ALLOWED TO BE ORDERED IN ALL DISTRICT COURTS.

(a) AUTHORIZATION OF ARBITRATION.—Section 651(a) of title 28, United States Code, is amended—

(1) by striking "described in section 658";

(2) by striking "described in section 658(1)"; and

(3) by striking the last sentence.

(b) CERTIFICATION OF ARBITRATORS.—Section 656(a) of title 28, United States Code, is amended by striking "listed in section 658" and inserting "which authorizes the use of arbitration under this chapter".

(c) REMOVAL OF LIMITATION.—Section 658 of title 28, United States Code, and the item in the table of sections at the beginning of chapter 44 of title 28, United States Code, that relates to such section, are repealed.

SEC. 5. EXCEPTION TO LIMITATION ON MONEY DAMAGES.

(a) EXCEPTION.—Notwithstanding section 652(a)(1) of title 28, United States Code, establishing a limitation of $100,000 in money damages with respect to cases referred to arbitration, a district court whose local rule on the date of the enactment of this Act provides for a limitation on money damages, with respect to such cases, of not more than $150,000, may continue to apply the higher limitation.

(b) CONFORMING AMENDMENT.—Section 652(a)(1) of title 28, United States Code, is amended by striking "section 901(c) of the Judicial Improvements and Access to Justice Act" and inserting "section 5(a) of the Court Arbitration Authorization Act of 1993".

(c) REMOVAL OF PRIOR PROVISION.—Section 901 of the Judicial Improvements and Access to Justice Act is amended by striking subsection (c) (28 U.S.C. 652 note).

Mr. HUGHES. The gentleman from California.

Mr. MOORHEAD. Thank you, Mr. Chairman.

I would like to commend you for scheduling this hearing on H.R. 1102, the Court Arbitration Authorization Act of 1993, of which I am happy to be a cosponsor. H.R. 1102 imposes nothing on our brethren in the Federal judiciary other than it allows them to establish by local rule voluntary or mandatory arbitration programs tailored to meet the needs of their particular judicial districts.

H.R. 1102, which will provide the Federal courts with maximum flexibility in this area is consistent with the Federal Judicial Center Study of the 10 mandatory arbitration programs in which they found that these programs are providing increased options to litigants in a fair manner while reducing the cost and time to disposition as well as court caseload.

I must say that I am hard pressed to understand the argument of those who claim that arbitration somehow represents a second-class system of justice. This argument is completely contrary to the experience of the Federal courts with arbitration to date. Moreover, it completely ignores the fact that a trial de novo is always available to a litigant who is dissatisfied with the arbitration process.

In addition, there is every indication that arbitration is far more cost-effective and, indeed, preferred by lawyers and litigants for cases that do not involve large sums of money, especially when contrasted to the more costly option of taking these cases to trial for a final resolution.

Mr. Chairman, I am hopeful that we will be able to expeditiously move this legislation through the process, and I certainly look forward to the testimony of our distinguished witnesses. I would like to say, with the tremendous load that the courts, both State and Federal, are now having to carry, it is vital that we find ways to take care of these cases in a manner that is satisfactory to the litigants.

I know, in many areas across the country, we are going to these rent-a-judge programs, and all other kinds of programs in order to get cases through the court system and get them disposed of in a reasonable period of time. The judges who are best liked by the lawyers usually are those who are able to impose settlements on the litigants that are logical far before trial ever takes place. This is happening around the country in part, in order to enable us, with the tremendous load of criminal cases that we have, to get civil cases disposed of. If you have to wait many, many years for a resolution of cases, you lose much of the justice that you have gone to court seeking, and I certainly am looking forward to the testimony of the judges here this morning on these issues.

Thank you.

Mr. HUGHES. Thank you, Mr. Moorhead.

We have two very distinguished panels this morning. Our first panelist is Judge William Schwarzer, a senior U.S. district judge for the Northern District of California, and Director of the Federal Judicial Center.

Prior to his present position, Judge Schwarzer served as Senior Counsel to the President's Commission on CIA Activities within the United States, as Chairman of the United States Judicial Conference Committee on Federal and State Jurisdiction, and as a

member of the American Law Institute's Advisory Committee on Complex Litigation. Judge Schwarzer has published several books and numerous articles on subjects relating to the Federal courts and the administration of justice.

The next panelist is Judge Ann Williams, a U.S. district judge for the Northern District of Illinois. Prior to this position, she has been a law clerk to the U.S. Court of Appeals Judge Robert A. Sprecher, an assistant U.S. attorney for the Northern District of Illinois, and is an adjunct professor and lecturer at Northwestern University Law School.

Our final panelist is Judge Jerome B. Simandle, a U.S. district judge for New Jersey at Camden. Judge Simandle previously served as a U.S. magistrate judge in New Jersey, I might say with great distinction, and as a clerk for Chief Judge Gerry, and as an assistant U.S. attorney in New Jersey.

Both Judges Williams and Simandle serve on the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

We welcome you here this morning. Your statements, without objection, will all be made a part of the record in full. They are very comprehensive. We hope that you can summarize, but you may proceed as you see fit. Why don't we begin with you, Judge Schwarzer.

STATEMENT OF WILLIAM W. SCHWARZER, SENIOR U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF CALIFORNIA, AND DIRECTOR, FEDERAL JUDICIAL CENTER

Judge SCHWARZER. Thank you, Mr. Chairman and Congressman Moorhead.

I appreciate the opportunity to appear before you today. I appear on behalf of the Federal Judicial Center and its Board which is chaired by the Chief Justice. As you know, the Board unanimously adopted a resolution recommending that Congress authorize the existing pilot courts to retain their programs of court-annexed arbitration and authorize other courts wishing to do so to adopt programs of mandatory or voluntary court-annexed arbitration. That recommendation was based on the extensive study conducted by the Center to which you have referred, which is published in this blue booklet of which you all have copies.[1]

I don't want to repeat what is in my statement, so let me just touch on a few highlights that might be of interest. The bottom line of the Center's report is that in the districts in which mandatory court-annexed arbitration has been in operation, it has met with the overwhelming satisfaction of parties, lawyers and judges.

Some of the key data that the report disclosed are these: That on the question of whether arbitration procedure was fair, and whether the particular hearing was fair, over 80 percent of the parties, and over 80 percent of the lawyers, agreed or strongly agreed that it was fair.

Interestingly enough, on the question of what decisionmaker they preferred, almost half of the parties and half of the lawyers pre-

[1] A copy of the study, "Court-Annexed Arbitration in Ten District Courts (Federal Judicial Center 1990)" has been retained on file in the subcommittee and will be made available for review upon request.

ferred arbitration over either judges or jury trials by a significant margin.

On the question of whether they approved court-annexed arbitration, over 80 percent of the participants either agreed or strongly agreed.

And 65 percent of the lawyers thought their clients saved time, 55 percent of the parties thought that the costs were reasonable, and over 50 percent of the lawyers thought it led to earlier settlements.

Now the participating judges themselves, overwhelmingly, supported arbitration. That is significant in view of the fact that the Judicial Conference gave only limited support to the pending bill limiting it to the repeal of the sunset clause, but the majority did not support the extension of the program. I think it is important to note that this matter came before the Judicial Conference without any briefing, and without any discussion of the facts. The Conference did not have before it the data that I have just disclosed, nor did the Judicial Conference at the time realize that its action represented a reversal of 15 years of unqualified support by the Judicial Conference of mandatory court-annexed arbitration. It is expected that this matter will come up again in September for reconsideration, and I think at that time the outcome will be different.

One illustration of the lack of information of the judges who voted on this: One judge told me the reason he voted against the resolution was that he didn't like the sanctions associated with mandatory court-annexed arbitration. He had the idea that if a party chose to go to trial de novo and didn't do better, there would be heavy sanctions imposed. As the report shows, the largest sanction imposed is the fee for the arbitrators, and that runs, generally, about $100 or $200. The report itself shows the existence of those sanctions did not deter requests for trials de novo and, of course, the amount of the fees is insignificant; if a party decides to go to trial, the cost that party is willing to assume is much greater than any arbitration fees that it might have to pay as a result of not doing better.

So what this report shows is that in the participating districts, the judges who knew about the program were 97 percent for the program, either they were positive or very positive in support of their own program, and not only that, but the judges, by that same margin, favored the extension of this program to other districts.

My own personal experience bears that out. While I sat in San Francisco, we had mandatory court-annexed arbitration for about 12 years, and I estimate that about 10 or 15 percent of my cases I never saw. It substantially reduced my load. In addition to that, I don't think I ever had a single trial de novo coming before me, which indicates the satisfaction with the outcome.

Let me make one further point. The Congress passed the Civil Justice Reform Act in 1990, and that act, in effect, mandates the adoption of ADR programs. It doesn't seem to me to make a lot of sense for Congress to require the courts either to adopt or at least seriously consider ADR programs and, at the same time, fence off a program that has proved to be very successful and very satisfactory to the participants.

I guess I should make one other point. As Congressman Moorhead noted, some people think that court-annexed arbitration provides second-class justice for people with small cases. Actually, the contrary is true. If you have a case of $100,000 or less, it is generally uneconomical to litigate and, in most cases, almost invariably, it will settle anyway. Through court-annexed mandatory arbitration, participants, parties in those cases, have an opportunity at very low cost and without long delay to get an objective evaluation of their case by an arbitrator.

If they don't have that, all they are left with is a settlement process, which is all right, as far as it goes, but doesn't provide litigants the same satisfaction of having a neutral look at their case and say, this is what we think is going to be the outcome. So it really provides an additional option of access to justice to people who can't afford to go through a full trial.

Thank you very much, and I will be glad to answer any questions.

Mr. HUGHES. Thank you, Judge.

[The prepared statement of Judge Schwarzer follows:]

PREPARED STATEMENT OF WILLIAM W. SCHWARZER, SENIOR U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF CALIFORNIA, AND DIRECTOR, FEDERAL JUDICIAL CENTER

My name is William W. Schwarzer. I am a Senior United States District Judge for the Northern District of California and the Director of the Federal Judicial Center. I served as a judge of the United States District Court for the Northern District of California from 1976 until 1990 when I assumed my present duties as Director of the Judicial Center.

This statement was prepared in response to a request from the Honorable Jack Brooks, Chairman of the House Judiciary Committee. My purpose in appearing before you today is to urge that your Subcommittee adopt the recommendations of the Board of the Federal Judicial Center, chaired by the Chief Justice, and to support enactment of the Court Arbitration Authorization Act of 1993, HR 1102. I thank the Committee for the opportunity to appear and testify.

I. BACKGROUND

It is now generally accepted that exclusive reliance on traditional adjudication can no longer adequately serve the goal of providing a just, speedy, and inexpensive determination of every civil action filed in the federal district courts. An increasing number of courts are therefore sponsoring alternative dispute resolution (ADR) programs and Congress itself has acknowledged the vital role of such programs in the Civil Justice Reform Act of 1990 (CJRA), requiring certain districts to adopt and others to consider adopting ADR programs. Such programs can provide cost-effective means of resolving disputes, lessen litigation cost and delay, and reduce civil backlogs and judicial burden.

Court-annexed arbitration is one of several court-based ADR options (to be distinguished from ADR techniques developed by individual judges in particular cases). Other ADR programs in use by courts include Early Neutral Evaluation, Case Valuation, non-binding Summary Jury or Bench (Mini) Trial, and Mediation. Each of these procedures is intended to assist litigants in resolving their disputes short of full trial, and they do so by providing non-binding input from a neutral party In addition binding arbitration is available but is of course dependent on consent by all parties.

A defining feature of arbitration is that it provides parties an expert's judgment on the merits of a case after a semi-formal adjudicative hearing. This feature makes arbitration particularly suited to the settlement of contract and tort cases involving modest sums of money, i.e., cases in which litigation costs tend to be disproportionate to the amount at stake. Arbitration is distinguished from mediation which is an informal process where a neutral helps the parties identify the issues in dispute and reach agreement. The mediator's role is to encourage the litigants to reach a negotiated settlement, not to offer an opinion on the merits.

Presently participation in the available court-based ADR programs other than mandatory court-annexed arbitration is dependent on the consent of the parties (ex-

cept for a few settlement, mediation and valuation programs). In 1988, Congress enacted legislation authorizing ten pilot courts either to continue mandatory court-annexed arbitration programs then in operation or institute new programs. The legislation also authorized the adoption of voluntary arbitration programs in ten additional courts (to be selected by the Judicial Conference of the United States) 28 U.S.C. §§ 651–658.

The ten mandatory arbitration pilot courts are: Eastern Pennsylvania, Middle Florida, Western Missouri, Western Oklahoma, Middle North Carolina, Northern California, Western Michigan, New Jersey, Eastern New York, Western Texas.

The ten pilot courts approved to adopt voluntary arbitration programs are: Arizona,* Middle Georgia,* Western Kentucky, Northern New York,* Western New York,* Northern Ohio,* Western Pennsylvania,* Western Virginia, Utah, Western Washington.*

Only the seven voluntary courts marked with an asterisk have programs in operation at this time.

The statutory authority for these programs expires in November 1993.

In addition to authorizing the continuation of existing mandatory programs and the adoption of voluntary programs in ten new pilot courts, the 1988 legislation directed the Federal Judicial Center to submit to Congress a report on its implementation within five years of enactment. The Federal Judicial Center was, at that time, already in the process of evaluating the ten mandatory programs using a research design that Congress formally embodied in its 1988 legislation. This study was transmitted to Congress on October 4, 1991, along with the Center Board's legislative recommendations. I testified before this Committee on May 20, 1992, reporting on the results of the Center's study and urging favorable consideration of the recommendations. I appear again for the same purpose and to urge support of the pending bill.

General Description of Court-Annexed Arbitration Procedures

Court-annexed arbitration generally consists of the following elements:

Cases are either mandatorily referred to, or given the opportunity for, an arbitration hearing conducted by a single arbitrator or by a panel of three arbitrators.

The arbitrators are lawyers who meet qualification standards set by the court and who are willing to serve for a nominal fee or no fee at all. Assignment of arbitrators is typically accomplished either by random draw from a qualified pool of potential arbitrators (often with the opportunity for parties to strike names) or by the parties reaching consensus on a nomination.

The hearing is generally held within two to six months of the time the case is at issue, after limited discovery.

Testimony is taken under oath at a hearing where each side presents its case within a framework of relaxed rules of evidence. Following the hearing, arbitrators issue a decision on the merits of the case and, where appropriate, determine an award.

Parties dissatisfied with the decision have a specified period of time in which to then file a demand for trial de novo. If a demand is filed, the case is returned to the regular docket for trial by the assigned judge, and the trial is conducted as though no arbitration proceeding occurred. If a trial de novo is not demanded, the arbitration award becomes a non-appealable judgment of the court.

II. RESULTS OF THE EVALUATION OF MANDATORY ARBITRATION PROGRAMS

The Board of the Federal Judicial Center adopted its legislative recommendations on the strength of research conducted by the Center and others. The Center's research evaluated the mandatory court-annexed arbitration programs of the ten pilot courts, and its findings have been published and previously submitted to the Committee. See, B. Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center 1990).

The primary objective of the evaluation was to determine whether litigants—in particular, the parties—view arbitration as a form of second-class justice. Because this is an issue of major concern to legislatures and courts contemplating adoption of such programs, the research examined participant satisfaction and views about the fairness of arbitration procedures through surveys of 3,501 attorneys, 723 parties and 62 judges.

A secondary objective of the evaluation was to determine whether participants felt the programs were addressing goals such as providing litigants with expanded options and were reducing cost, delay, and court burden This part of the evaluation was informed by case statistics and the survey information. The major findings of the study as to each of these objectives are as follows:

Litigant Satisfaction and Views on the Fairness of Procedures.—The study found no evidence that litigants felt they had received second-class justice. Both lawyers and parties involved in the mandatory programs overwhelmingly approved the arbitration procedures, generally, and believed that the procedures used in their individual hearings were fair. Parties and attorneys selected arbitration as the preferred decision-making process over juries and judges by substantial margins.

Increased Options for Litigants.—Arbitration offers parties an opportunity to receive an advisory adjudication on the merits in cases that would otherwise terminate without a response from a neutral third party. Arbitration programs can provide for this adjudication at an earlier time than is possible through trial and substantial numbers of parties find this attractive. Even where a trial de novo demand was made, over half of the parties and attorneys did not consider that arbitration was a waste of time.

Cost Reduction.—Arbitration programs may reduce the cost of litigation. When asked whether they thought savings were achieved through arbitration about two-thirds of the attorneys responded affirmatively. When asked whether their dispute was resolved at a reasonable cost, about two-thirds of the parties responded in the same way.

Reduction in Time to Disposition.—Parties reported reasonable case processing times for arbitration cases and arbitration does not appear to delay resolution of de novo demand cases. Other Federal Judicial Center research has found that arbitration programs can, but do not always, reduce disposition times.[1]

Reduction in Court Burden.—Court-annexed programs tend to reduce judges' caseload burden so that judicial resources can be reallocated to other cases on the court's calendar.[2] A large majority of the judges supported their court's arbitration program and believe that arbitration reduces court burden. The view that other courts would do well to introduce arbitration was almost universally supported.

III. THE LEGISLATIVE RECOMMENDATIONS OF THE BOARD OF THE FEDERAL JUDICIAL CENTER

On the basis of these findings, the Center's Board recommended that Congress authorize any federal district court to adopt a program of mandatory court-annexed arbitration. Recognizing that this research did not compare the relative merits of mandatory and voluntary programs, but reasoning that the evidence needed to support authorization of mandatory programs was more than adequate to support inclusion of a recommendation in favor of voluntary programs as well, the Board adopted the following resolution:

> Pursuant to the requirements of § 903(b) of Pub. L. 100-702, and based on findings from studies conducted by the Federal Judicial Center, and without diminishing the authority of federal district judges to manage their assigned cases, the Center Board recommends that:
>
> (1) Congress enact a provision in 28 U.S.C. authorizing all federal courts to adopt, in their discretion, local rules for arbitration, to be mandatory or voluntary in the discretion of the court, and
>
> (2) the Federal Judicial Center study and report on the experience of courts using voluntary programs, and
>
> (3) the Judicial Conference of the United States monitor, through reports of the Federal Judicial Center and otherwise, the federal courts' experience with arbitration in order to formulate policies to guide and support such programs and to develop more specific recommendations to Congress.

The Center has begun a study of the voluntary programs.

IV. THE VOLUNTARY VS. MANDATORY DISTINCTION

Mandatory Programs

The most frequently expressed concerns about the mandatory referral of cases to alternative dispute resolution programs is a perception that it may interfere with

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[1] A previous Federal Judicial Center evaluation of court-annexed arbitration in three district courts had found such programs capable of achieving the utilitarian goal of reducing time to disposition. E. Lind & J. Shapard, *Evaluation of Court-Annexed Arbitration in Three Federal District Courts* (Federal Judicial Center rev. ed. 1983).

[2] A previous Federal Judicial Center evaluation of court-annexed arbitration in three district courts had found that the programs were likely to have reduced the incidence of trials. E. Lind & J. Shapard, *Evaluation of Court-Annexed Arbitration in Three Federal District Courts* (Federal Judicial Center rev. ed. 1983).

the right to a full trial and that it may lead litigants to believe that they are receiving second-class justice.

The Right to Trial.—While eligible cases are placed into a mandatory arbitration track upon filing, they are also assigned to a district judge who has the power to remove them. On a showing of good cause, therefore, a party can avoid arbitration should it be inefficient or inappropriate for the case.

A party always has a right to claim a trial de novo following the arbitration. The arbitration decision becomes binding only after expiration of the time in which a party may demand a trial de novo. A dissatisfied litigant therefore retains the right to go to trial Some programs build in disincentives to de novo demands by specifying that litigants who make a demand but do not receive a judgment that is better than the arbitration award must pay the arbitrator's fee. These fees range from $75 to $800 depending on the program. Most programs also require that an amount equal to the fees be posted at the time the de novo demand is made.

The study produced no evidence indicating that the disincentives are seen as significant barriers to proceeding beyond the arbitration hearing. Indeed, districts with higher fees had proportionally more cases arbitrated and more de novo demands than those with lower fees. There was also no evidence that a requirement for the up-front posting of fees affected demands for trial. Given the insignificance of these financial disincentives compared to the cost of going to trial, it is unlikely that they would dissuade a litigant who would otherwise have pursued the case to trial from making a de novo demand In fact, trial may not have been a realistic option to begin with for many of the small-stake cases that are referred to these programs; cases with a prayer of $100,000, the statutory limit (except in grandfathered districts) can rarely be litigated economically in federal court. Rather than imposing a barrier to trial, arbitration may in practice actually afford a cost-effective adjudicative alternative to litigants who could not afford conventional adjudication.

Second-Class Justice.—There is no evidence that litigants in cases mandatorily referred to arbitration see themselves as receiving second-class justice. Eighty percent of all parties in cases mandatorily referred to arbitration agreed that the procedures used to handle their cases were fair. Agreement was even higher (84%) among parties with previous trial experience. In the Middle District of North Carolina a random design was used for the evaluation, and parties in arbitration cases were significantly more likely to say that the procedures used to handle their case were fair than were those in a control group of cases that went through regular procedures. Further, half of all parties who participated in an arbitration hearing selected arbitration as their preferred method of decision making when asked to choose among judges, juries, arbitration, or given the choice of stating that it "makes no difference."

Voluntary Programs

It is sometimes said that if court-annexed arbitration is a good thing, why not let it fly on its own merits instead of mandating participation. This thinking motivated those of the judges who at the recent meeting of the Judicial Conference opposed extension of mandatory program authority to other than the ten pilot districts.[3] Of course, authorizing courts to adopt a mandatory program does not require any to participate. The pending bill, and the Federal Judicial Center recommendation, would only permit—not require—a court to adopt a program, either mandatory or voluntary.

Experience has demonstrated, however, that voluntary programs experience difficulty in attracting and retaining cases. The seven courts with voluntary programs active at the end of January 1993 rely on three different systems for referring cases to arbitration; these courts have experienced different degrees of success. One system refers cases to the program through simple notification, by way of a local rule, that the program is available should litigants wish to use it. The two courts with voluntary programs modeled after this referral system have been in operation only a short time (between them a total of ten months). In that time, however, only one case has requested referral to arbitration.

A second referral system involves giving notice and inviting selected cases to opt into the program. One court has structured its arbitration program around this approach and engaged in extensive outreach efforts to potential users. In addition,

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[3] The issue came before the meeting of the Judicial Conference without the benefit of study or background briefing. Judges whose courts have participated in mandatory arbitration programs bring a different perspective to the issue. Here are the results of the Center's study of judges views in the ten mandatory pilot districts:

Support for court-annexed arbitration programs: very positive, 78.9%; somewhat positive, 17.5%.

Other courts would do well to introduce the program: strongly agree, 61.0%; agree, 35.6%.

judges discuss the availability of arbitration with litigants at a scheduled pretrial conference. Of more than 1800 cases given notice thus far, however, only four cases have consented to enter the program.

A more aggressive system for referral involves placing selected cases into the program subject to liberal opt-out provisions Four courts have adopted this approach with varying degrees of success. One of these courts has had a program in operation for a year now. Though participants and judges consider the program quite successful, it has experienced a 70% opt-out rate. The other courts have done better, but their early opt-out rates of 47%, 49%, and 56% (after more than a year in operation for each) still reflect a significantly lower rate of participation than found among the mandatory programs. At the same time, the courts have not seen these lower participation rates translate into a corresponding decrease in the rate at which trials de novo are demanded.

No data are yet available on litigant satisfaction with voluntary programs and the numbers reported above are early findings that may change. I mention them to illustrate, however, that the theoretical appeal of voluntary procedures diminishes greatly in light of the problems that impair their effectiveness and utility.

A recent study by the Law and Public Policy Committee of the Society of Professionals in Dispute Resolution (SPIDR), a professional organization whose membership is made up of dispute resolution experts, offered the following as potential advantages of mandatory over voluntary participation:

Parties frequently respond favorably to mandated resolution. Some are receptive to court control of the procedures. In some instances, this is preferable to placing control in the hands of an opponent, who may be forcing them to spend thousands of dollars on litigation while refusing a "face to face" discussion.

Rates of voluntary usage are often low because parties or their lawyers are more accustomed to the litigation process or do not want to signal to their adversary a desire for compromise. Mandating use of dispute resolution processes often increases substantially the total number or cases settled through their use.

Effective dispute resolution programs require adequate administrative support. By increasing the caseload, mandated participation allows the administration to be provided on a cost-effective basis.

The expanded use of ADR processes as a result of mandating participation will serve to educate the parties and their lawyers, perhaps resulting in an increased voluntary use of dispute resolution programs outside the court process.[4]

While we will continue our study of these programs, the consideration of legislation to authorize courts to adopt either mandatory or voluntary programs should not be delayed in the expectation that the voluntary programs will prove to be as successful as mandatory programs. Timely action on the recommendations is particularly important in light of the confusion that has followed passage of the Civil Justice Reform Act of 1990.

V. THE CONFUSED STATUS OF ARBITRATION UNDER THE CIVIL JUSTICE REFORM ACT

The Civil Justice Reform Act of 1990 requires each district court to adopt and implement a Civil Justice Expense and Delay Reduction plan by December 31, 1993 (Pub. L. 101–650, § 471). Section 473(a)(6) of the Act requires courts to consider "authorization to refer appropriate cases to alternative dispute resolution programs that (A) have been designated for use in a district court; or (B) the court may make available, including mediation, mini trial, and summary jury trial." A number of courts subsequently inquired as to whether they may consider adoption of any type of arbitration program if they are not one of the 20 arbitration courts authorized by the Judicial Improvements and Access to Justice Act of 1988.

The General Counsel of the Administrative Office of the United States Courts issued an advisory opinion on July 5, 1991, stating that, in his view, "the CJRA should be read as not expanding arbitration beyond that already statutorily provided." While not all courts agree with this interpretation, noting that the list of programs that courts may make available under 473(a)(6)(B) is not exhaustive, most have so far felt bound by it. As a result only a few courts have proceeded with plans to offer court-annexed arbitration programs.[5] Other courts have been discouraged from considering adoption of court-annexed arbitration. It would be ironic, indeed,

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[4] *Court ADR: Elements of Program Design,* a publication of the CPR Legal Program, CPR Judicial Project, by Elizabeth Plapinger and Margaret Shaw, (p.16), 1992.

[5] Four early implementation districts that were not covered by the Judicial Improvements and Access to Justice Act of 1988 included provisions for voluntary court-annexed arbitration in their cost-and-delay-reduction plans but it is not known how active these programs are. A fifth district has deferred implementation of an arbitration program pending legislative clarification.

for Congress—after mandating the adoption, or least consideration, of ADR programs by every district—to withhold authority to adopt the program that 1) has been most closely studied and has proved itself satisfactory to nearly all the participating judges, attorneys and parties, and 2) provides litigants in smaller dollar cases the only option for an early and inexpensive advisory adjudication on the merits.

I therefore respectfully urge adoption of the Center Board's recommendation and enactment of the Court Arbitration Authorization Act of 1993.

Mr. HUGHES. Judge Williams, welcome.

STATEMENT OF ANN CLAIRE WILLIAMS, JUDGE, U.S. DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Judge WILLIAMS. Good morning, Mr. Chairman and Mr. Moorhead. I am Judge Ann Williams, and I sit on the Northern District of Illinois, as you mentioned.

Thank you for this opportunity to appear before you to testify on alternative dispute resolution in the Federal courts. I am here in my capacity as a representative of the Judicial Conference, the policymaking body of the Federal court.

My primary goal is to report to you the Conference's position on expansion of court-annexed arbitration programs. If I have any time left, I will also touch on the status of ADR procedures and initiatives which have resulted from the enactment of CJRA.

As you mentioned, and we are all aware, because of the sunset provision, new legislation is necessary to expand ADR in the Federal courts. In light of that expiration date, the committee on which I serve, Court Administration and Case Management, reviewed the FJC report which Judge Schwarzer has referred to, as well as the effectiveness of State ADR programs, and concluded that it was important to expand this legislation.

In light of that, and seeing the effectiveness of these programs, we made two unanimous recommendations to the Judicial Conference, one, for continued authorization for court-annexed arbitration in the 20 districts beyond November 1993 and, second, legislation to permit but not to require all districts to utilize mandatory or voluntary ADR programs.

Just let me pause for a moment to make sure we are on the same wavelength, when I refer to mandatory or voluntary ADR, the focus is on how cases come into the arbitration system, how a case gets into the system, not the end result. If it is mandatory ADR, at some point, after a case is filed, the parties must participate in the ADR program, unless some good cause is shown to the court, whether they want to participate or not.

Take that same case, if it is a voluntary ADR, at some point, again, after the case is filed, the parties are advised that arbitration is available, and it is totally up to the parties to determine whether they want to proceed in arbitration. The mandatory or voluntary ADR has nothing to do with whether the parties are bound to the result or the outcome of the arbitration because, if they are unhappy with the result, they can go to trial de novo.

In March, the Judicial Conference, as Judge Schwarzer mentioned, considered this matter, and they supported that first recommendation to extend the existence of the 20 ADR programs. As to the second recommendation, the Conference agreed to seek statutory authority for all Federal courts to have the option of creating

voluntary ADR programs. However, after only a brief general discussion, and Judge Schwarzer who was present, elaborated on that, the Conference did not, at that time, approve expansion of mandatory ADR options to all the courts.

In light of the Conference's position, the Committee on Court Administration and Case Management has put the issue of providing that mandatory option to all courts on the June agenda. Based on conversations that I have had with other committee members, it is my expectation that our committee will again recommend to the Judicial Conference that the mandatory option be given to all district courts. We have every expectation that the Judicial Conference will, again, reconsider and revisit this issue in September.

A couple of other points that I wanted to make, as Judge Schwarzer has mentioned, CJRA requires all the districts to consider ADR alternatives, and of the 38 courts that have already provided plans, 37 have provisions for ADR or suggestions for ADR procedures in their districts. All of the plans must be filed by December 1993, and we expect that the majority of the plans will have ADR provisions.

Also, I think it is important to note that those CJR plans as well as the model plans, and any reports to Congress, because of the suggestion of the Court Administration Committee, and because of the hard work of the Federal Judicial Center, will now be made available on Westlaw so that anyone who wants that information on plans will have that information available.

In addition, pursuant to the CJRA Act, the Rand Corp. will, among other things, perform a comprehensive evaluation of ADR programs in the CJRA pilot courts which must be completed by 1995.

Clearly, the enactment of CJRA will have an impact on ADR programs in the Federal court. The heightened awareness of the variety of techniques available for experimentation as well as enhanced sensitivity to the benefit of such programs to the judiciary and the public should result from these programs. The courts, the bar, and the litigants will derive great benefit, I believe, from ADR programs that streamline the process, yet provide fair and just resolution to legal disputes without the costs associated with trying cases to verdict.

Again, thank you for this opportunity to appear on behalf of the Judicial Conference. I would be pleased to answer any questions at this point, or after the testimony of Judge Simandle.

Mr. HUGHES. Thank you, Judge Williams.

[The prepared statement of Judge Williams follows:]

PREPARED STATEMENT OF ANN CLAIRE WILLIAMS, JUDGE, U.S. DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Mr. Chairman:

I am Judge Ann Claire Williams of the United States District Court for the Northern District of Illinois. I serve as a member of the Judicial Conference Committee on Court Administration and Case Management, and as the Chair of its Subcommittee for Case Management. I appear before you as a representative of the Judicial Conference, which is the policy making body of the judiciary, to report on the position of the Judicial Conference regarding the expansion of court annexed arbitration programs in the federal courts. Further, I will report on the status of ADR procedures in the federal courts and describe the additional ADR initiatives which are being undertaken as a result of the Civil Justice Reform Act.

JUDICIAL CONFERENCE POLICY ON COURT ANNEXED ARBITRATION PROGRAMS

The Judicial Conference, at its recent meeting in March 1993, considered a recommendation to support legislation to permit the expansion of court annexed arbitration programs in the federal courts. This portion of my testimony will provide the background for consideration of this issue and will address the action taken by the Judicial Conference action.

The Judicial Improvements and Access to Justice Act of 1988, Public Law No. 100–72, authorized the continuation of mandatory court annexed arbitration programs previously piloted by the Judicial Conference in ten district courts and permitted the designation of ten additional courts to adopt programs of voluntary court annexed arbitration. The legislation included a sunset date of five years after enactment, which was on November 19, 1988. The Committee on Court Administration and Case Management, on which I serve, unanimously made the following recommendation to the Judicial Conference. The recommendation was twofold: (1) to support Legislation to continue authorization for the court annexed arbitration programs in the twenty district courts designated, beyond the sunset date of November 19, 1993; and (2) to support legislation to permit, but not to require, all district courts to utilize mandatory or voluntary court annexed arbitration programs.

The Committee on Court Administration and Case Management recognized that, in the past decade, many federal and state courts have adopted alternative techniques to standard procedures for litigating civil cases. The Committee, in part, based its recommendation to the Judicial Conference on a belief that the experience to date provides justification for allowing individual federal courts to institute techniques, including court annexed arbitration, tailored to suit their specific needs.

The Judicial Conference approved the first part of the recommendation; however, the Conference modified and limited the latter recommendation. The Judicial Conference agreed to seek statutory authority for all federal courts to have the discretion to utilize voluntary court annexed arbitration programs, rather than expanding mandatory court annexed arbitration programs.

The Judicial Conference clearly supports the enactment of legislation to authorize the continuation of court annexed arbitration programs in the twenty federal courts designated, and the Conference is optimistic that Congress will enact such legislation to continue authorization of these programs beyond the sunset date of November 19, 1993.

There is strong reason to believe, however, that the Judicial Conference will likely revisit this issue in September 1993, upon recommendation of its Committee on Court Administration and Case Management. That Committee had unanimously supported the expansion of both voluntary and mandatory court annexed arbitration programs to all federal courts. From recent conversations with Committee members, it is my impression that the Committeee will again present this recommendation to the Conference. We anticipate that the Judicial Conference, upon further examination of this issue, will reconsider its position and are optimistic that the Judicial Conference will reaffirm support for the enactment of legislation to authorize the expansion of both voluntary and mandatory court annexed arbitration programs in the federal courts.

ALTERNATIVE DISPUTE RESOLUTION PROGRAMS BEFORE THE CJRA

Judicial use of Alternative Dispute Resolution (ADR) programs was firmly grounded in the Federal Courts even before the adoption of the Civil Justice Reform Act (CJRA). Prior to the CJRA, at least thirty-six (36) Federal district courts had adopted some type of alternative dispute resolution program. (See Exhibit I, attached.) Faced with the pressures caused by burgeoning civil case dockets, courts looked to alternatives to the normal litigatiton route. The courts soon recognized that in addition to a docket control mechanism, ADR programs had intrinsic value; they bring better results for litigants than trials. ADR programs offer an alternative to the winner take all result of the trial; often settlements can be structured so that all parties are satisfied with the outcome.

There are several basic types of Judicial ADR models which the courts have modified to suit their individual needs. Some courts use outside attorneys to mediate disputes, others use court personnel such as judges or magistrates to hold settlement conferences. Some courts have mandatory programs, while others have voluntary participation. In most courts the mediators serve pro bono, but in some the parties pay for their services. Most of the ADR programs require that a person with settlement authority be present.

As a general rule, it is only civil cases that are assigned to an ADR program. In at least one court, a case may be assigned to more than one program. If mediation

fails, the case may then be assigned to a settlement conference. If settlement is still not reached, it may then be sent to arbitration.

The basic ADR models that were in place in the district courts before the adoption of the CJRA are:

Early Neutral Evaluation (ENE).—In this program, the parties meet early in the case process with a private attorney, who is an expert in the subject matter of the dispute, and present each side of the dispute. The evaluator then identifies the issues and assesses the strengths and weaknesses of each position. Settlement is not the main goal of this program, although it is expected that ENE will foster settlement. The evaluator may suggest more meetings, or suggest a discovery plan. Generally, civil cases that seek monetary relief rather than equitable relief are included in the ENE program.

Three districts had an ENE program in effect before the CJRA was adopted.

Settlement Judge or Magistrate Judge.—The settlement conference is the most common form of ADR. Because this is the most widely used program, there are many variations from court to court. The conference can take place at any time during the litigation process; before discovery or on the eve of trial. In some courts settlement conferences are assigned to a designated "settlement judge" or "settlement magistrate judge," in others to any judge other than the assigned judge in the case. Still in others, cases are assigned out to an attorney or panel of attorneys. The "settlement" judge appraises the case and the chances of winning a jury verdict, and usually suggests a settlement figure.

Seven districts had some form of "Settlement Judge or Magistrate Judge" program before the adoption of the CRA.

Mediation.—Mediation programs provide the parties with trained neutral mediators, generally attorneys, to assist the parties to resolve their dispute consensually and reach a negotiated settlement. The mediator works with the parties to discern the underlying issues in the case, attempting to understand what the parties really want out of the suit. This program offers the opportunity to craft creative solutions. All discussions are confidential; the assigned judge is only notified if the case is settled. The process is non-binding unless settlement is reached. In some districts, the court assigns a mediator, in others, the parties choose the mediator. While it is more common for a single mediator to conduct the proceeding, in a few districts, one mediator is chosen from both the plaintiff's bar and defendant's bar.

Mediation programs were in effect in six district courts prior to the CJRA.

Settlement Week.—"Settlement Week" is the name given for a particular time period (i.e., usually one or two weeks) set aside by the court for the mediation of several pending cases. Used as a mechanism to address those cases that have been pending a long time (discovery usually complete), the court suspends its regular trial schedule to focus on a group of civil cases. Typically mediated by volunteer attorneys, the cases are returned to the trial calendar if they are not settled. Sometimes courts hold a settlement week more than one time a year; sometimes it is just a day, rather than a week, and in one court, it is a day set aside every week for settlement.

Prior to the CJRA, two districts were running Settlement Week programs.

Case Valuation.—Generally used in civil cases in which only a monetary award is sought, the case valuation program gives the parties an advisory award on the settlement value of the case. At the end of or close to the end of discovery, appropriate cases are referred to a panel of three mediators: one from the plaintiff's bar, one from the defendant's bar, and one neutral. Prior to this non-adversarial proceeding, the parties' counsel submit written summaries of the case with supporting evidence. At the hearing, the attorneys make a brief presentation with supporting evidence. This program differs from mediation in that the neutral does not participate in discussions with the litigants. The panel then makes a valuation of the case, which becomes the judgment unless the parties object.

Two districts had Case Valuation programs before the CJR was adopted.

Mini-Trials or Mini-Hearings—Used in commercial litigation matters, mini-trials and mini-hearings are private proceedings where each party makes a brief presentation of its case to a representative from each side with authority to settle. Referrals to this program are by consent of the parties, and the parties arrange and pay for the process. In the mini-trial program, there is usually a third-party neutral present also. Although termed mini-trial, these proceedings do not involve a judge or jury. The process takes a couple of days, and after the case is presented, the party representatives meet to try to settle the matter. The neutral may offer an advisory opinion.

Prior to the CJRA, at least one district had a Mini-Trial program, and a number of other courts had experimented with the procedure.

Summary Jury Trials.—The summary jury trial takes place before a judge or magistrate and a six-member advisory jury, that is paid the same fees as petit jurors. The evidence is presented to the jury by the attorneys and usually no witnesses are called. Each side is given approximately one hour to present its case. The jury makes a non-binding advisory verdict, or if the jury cannot reach a verdict, each juror makes a statement of findings. Scheduled after other settlement efforts have failed, this program is most often used in those complicated cases where a lengthy trial is expected.

Twelve districts were using Summary Jury Trials before the CJRA was adopted.

Arbitration.—The arbitration program involves the mandatory or voluntary referral of selected cases to a hearing for an advisory judgment on the merits. Chapter 44, sections, 651 through 658 of title 28, United States Code provides statutory authorization for the court-annexed arbitration programs. Ten district courts are authorized to have mandatory arbitration programs, and ten district courts are authorized to have voluntary arbitration programs.

Judge Simandle of the United States District Court for the District of New Jersey will provide an in-depth view of how a court annexed arbitration program has been working in his district.

Appellate Courts

In addition to the district courts, some of the federal appellate courts have had settlement programs for a number of years. Starting with the Second Circuit's Civil Appeals Management Program (CAMP) in the 1970s, several appellate courts have experimented with mediation programs. There are now active mediation programs in the First, Second, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits. The pre-argument conference attorneys, who are court personnel confer with counsel generally prior to the filing of the appellate briefs to pursue resolution of the appeal without judicial involvement. Depending on the geographical make-up of the various circuits, the conferences are either conducted in-person or by telephone. The programs have been successful, and three other circuits are planning to implement similar programs in the near future.

Unlike those circuits that use court personnel to mediate appeals, the United States Court of Appeals for the District of Columbia has a mediation program that enlists the aid of the local bar to mediate appeals.

THE CIVIL JUSTICE REFORM ACT AS IT RELATES TO ADR

The Civil Justice Reform Act of 1990 requires each United States district court to study its caseload and design a civil justice expense and delay reduction plan (hereinafter, "plan"). The statute declares that the purposes of each plan are "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management and ensure just, speedy, and inexpensive resolutions of civil disputes."

The Civil Justice Reform Act lists ADR as one of its six key principles. Indeed, the introductory portion of the Act identifies aspects of effective litigation management programs and includes the "utilization of alternative dispute resolution programs in appropriate cases." Section 102(S)(D). The Act requires each court to consider inclusion in its plan certain guidelines of litigation management. Among these is the "authorization to refer appropriate cases to alternative dispute resolution programs that—(A) have been designed for use in a district court; or (B) the court may make available, including mediation, minitrial, and summary jury trial." Section 473(a)(6). In addition, the Act directs the court to consider "a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation." Section 473(b)(4).

Thus, under the Act, each court is charged with the mission of instituting alternative dispute resolution techniques that best suit the preferences of the bench, bar, and interested public in the district. A significant factor in reducing cost and delay is any step toward disposition of a case without resort to litigation. Such measures might be court-wide, such as early neutral evaluation, mediation, arbitration, minitrial or summary jury trial; or they may be case-specific, such as the means of facilitating settlement negotiation (for example, requiring a representative with authority to bind the party to attend any settlement conference held).

Pilot Courts, Demonstration Courts and Early Implementation Districts

The Act requires the implementation of civil justice expense and delay reduction plans in all district courts within three years following enactment. Each court may develop its own plan or adopt a model plan to be developed by the Judicial Con-

ference. Although the statute does not mandate the components of each plan, it does set forth six principles and six techniques of litigation management and cost and delay reduction which courts must consider, and suggests several techniques to be used in designing the plans. In some courts—those designated as pilot courts—the statute establishes experimental techniques to be implemented. ADR is such a technique, and it figures prominently in the statute and the plans submitted to date.

The Act requires the Judicial Conference to conduct pilot programs. The Act specifies that ten courts must be designated as pilot courts, five of which must encompass major metropolitan areas. These pilot courts must include all six principles of litigation management and cost and delay reduction set forth in Section 473(a) of the Act, including ADR.

In addition, there are five demonstration districts, which are specifically named in the Act. The Act mandates that three of the demonstration districts experiment with various methods of reducing cost and delay, including ADR techniques.

A third category established by the Act is the Early Implementation District (EID) program. These districts had to implement their plans by December 31, 1991. The statute does not specify which principles and techniques are to be incorporated within these plans.

Action of Civil Justice Expense and Delay Reduction Plans

Thirty-eight district courts have adopted civil justice expense and delay reduction plans as of April 26, 1993. These courts include ten pilot courts, twenty-four EIDs, of which four are demonstration courts, and four courts which have adopted plans within the last several months, one of which is a demonstration district. Demonstration districts are to experiment with various litigation management programs, including ADR. A chart listing the courts which have adopted plans is attached as Exhibit II.

A review of the thirty-eight civil justice expense and delay reduction plans adopted reveals that almost every court in the group has or will soon have in place some form of ADR. Thirty-seven of the courts have included some form of ADR or encourage use of ADR procedures in their plans; a majority of those courts have or will have multiple ADR programs. Only the ten pilot courts and three of the demonstration districts were required to include some form of ADR in their plans. A chart listing the different types of ADR included in the plans is attached as Exhibit III. To summarize the information contained in this chart, a review of the thirty-eight plans reveals that the courts will implement a wide variety of ADR techniques in satisfying the mission statement of this legislation. At least ten different types of ADR will be implemented in these courts, categorized as follows:

1. Voluntary mediation: 25 courts. 2. Non-binding arbitration: 16 courts. 3. Summary jury trials: 13 courts. 4. Early neutral evaluation (ENE): 10 courts. 5. Settlement conferences: 11 courts. 6. Minitrials: 11 courts. 7. Special masters: 4 courts. 8. Settlement week or settlement judge: 5 courts. 9. Settlement negotiations: 3 courts. 10. Trial before magistrate judges: 1 court.

In addition, eleven courts stated their general intention to implement ADR techniques, without specifying which techniques would be adopted.

To truly assess the impact of the CJRA on the implementation of ADR techniques in the federal district courts, we compare the plans submitted by the thirty-eight courts against the list of programs existing prior to the enactment of CJRA. Of the thirty-eight courts, eighteen had previously existing local rules adopting some form of ADR. Of those eighteen, all will expand their programs. Most will significantly expand their ADR programs by broadening the scope of their ADR program, adding new types of techniques to what already had been established.

For example, the Northern District of California, which has in place local rules to provide for early neutral evaluation, settlement conferences, and voluntary arbitration, will consider adding summary jury trials, special masters, and private ADR, as well as a pilot mediation program. The widespread dissemination of information about ADR options that the court provides also is an important element of the court's plan.

Another example is the Northern District of Indiana, which has a local rule generally providing for ADR in the court. That court's plan proposes the implementation of settlement conferences and early neutral evaluation, and proposes cautious experimentation with the more costly minitrials and summary jury trials. A third example is the district of Kansas, which has a local rule providing for settlement conferences. That district will supplement its ADR programs by encouraging the resolution of disputes through mediation, minitrials, summary jury trials, and arbitration.

Only a few courts indicate that they will rely on an expansion of already existing techniques. One aspect of such expansion would be accomplished by promotional ef-

fort directed to the court community, including education for the bar membership. Several courts have published pamphlets explaining their ADR programs, to be distributed by their counsel. One district is changing its bar application procedures to require certification that the applicant is familiar with ADR techniques.

Nineteen courts which had no previously established ADR program will implement ADR as a direct result of CJRA. Five of the courts in this category are pilot courts. Most of these courts have ambitious plans to implement more than one technique of ADR. Examples from this category would include: the District of Massachusetts, which will encourage settlement, minitrials, summary jury trials, and mediation; the Western District of Tennessee (a pilot court), which will actively urge the use of early neutral evaluation, settlement conferences, minitrials, and mediation, and explore the cost-effectiveness of summary jury trials; the Southern District of Texas (a pilot court), which will implement mediation, minitrials, summary jury trials, arbitration, and other ADR procedures; the District of Utah (a pilot court), which will experiment with mediation, arbitration, minitrials, and summary jury trials; and the Eastern District of Wisconsin (a pilot court), which will implement settlement conferences, special masters, early neutral evaluation, mediation, arbitration, and other ADR procedures.

Out of the thirty-eight courts which submitted plans, only one court rejected the concept of ADR for the present time.

The Model Civil Justice Expense and Delay Reduction Plan and Annual Assessments

The Model Civil Justice Expense and Delay Reduction Plan prepared by the Judicial Conference, pursuant to Section 103(a) of the Civil Justice Reform Act of 1990, contains an extensive section on ADR. This model plan incorporates provisions from many of the plans submitted by the pilot courts and EID courts. Included therein is a discussion of a majority of the types of ADR programs, including mediation, early neutral evaluation, and arbitration. The Model Plan also addresses such issues as educating the bar and the public about ADR programs, and it provides guidelines for administering an ADR program.

The Civil Justice Reform Act requires courts that have developed expense and delay reduction plans to "assess annually the condition of the court's civil and criminal dockets with a view to determining appropriate additional actions which may be taken" to reduce cost and delay in civil litigation (§475). As one might expect, many courts hope to enhance the ADR component of their civi justice expense and delay reduction plans. For example, the original plan prepared by the Southern District of California contained an arbitration and mediation program which was implemented on an experimental basis (i.e., even-numbered cases, only, were referred to ADR). After the district assessed its program, relying on anecdotal information, the plan was amended, removing the experimental nature of the program and allowing all cases to be referred to ADR at the judge's discretion. The District of New Jersey, after an extensive assessment of the docket and the original plan, created a formal mediation program. The Eastern District of Pennsylvania determined, after careful assessment of its mediation program, that with certain modifications, their program will be a useful tool in "increasing the successful resolution of cases early in the litigation process."

While each district is required to perform an annual assessment of its civil justice expense and delay reduction plan, the Act does not provide a uniform assessment procedure. Moreover, the individual courts have neither the expertise nor the funds to perform a statistically sound assessment; therefore, the Administrative Office of the United States Courts entered into a contractual agreement with the Rand Corporation to perform a study of ADR developments under the CJRA.

The Contract with the Rand Corporation

The Rand Corporation was awarded the contract for an independent study of pilot and comparison courts under section 105 of the Civil Justice Reform Act. The original contract was amended to incorporate an additional, more detailed study of Alternative Dispute Resolution programs developed by individual CJRA pilot and comparison courts in compliance with §473(a)(6) of the Act. This additional study already has commenced, allowing the research team to take advantage of planned site visits for the purposes of both studies. The Judicial Conference Committee on Court Administration and Case Management, through its Subcommittee on Case Management, has oversight for these studies.

The administration of this study has presented opportunities for the federal judiciary to examine and document operational trends and to gain first hand knowledge of the impact of new programs. The contract amendment for the study of pilot court ADR programs was an early outgrowth of this process. Initially, three of the largest pilot courts had intended to evaluate their own ADR programs. Through consulta-

tion with the Rand Corporation, the Judicial Conference recognized that given the importance ADR under the CJRA, it would be desirable to have a comprehensive study of the ADR programs implemented in the piot courts. In order to take advantage of the available data now now being gathered by the Rand Corporation for its study of the pilot courts, and also to minimize the cost of additional analysis required, the Judicial Conference authorized Rand to porform this adjunct study of ADR programs in the courts. The adjunct study will provide information to support the future development of ADR programs in the federal courts.

Six courts among the pilot and comparison districts of the primary study have been tentatively identified as potential ADR study sites. These courts were selected because they have well designed and executed ADR programs and sufficient case volumes to support existing sampling and survey research methods. The district courts selected include the following: the Southern District of California, the Eastern District of New York, the Southern District of New York, the Western District of Oklahoma, the Eastern District of Pennsylvania, and the Southern District of Texas.

Clearly, the enactment of CJRA will have a significant and profound impact on ADR programs at the federal district court level. A heightened awareness of the variety of techniques available for experimentation, as well as an enhanced sensitivity to the benefit of such programs, to both the judiciary and the public, should result from the creative implementation of these programs. The courts, the bar, and the litigants will derive great benefit from the progressive posture taken by these districts. We are confident that these new ideas to streamline the pretrial process can be implemented in such a manner as to preserve the fair and open nature of our courts.

Availability of CJRA Plans to the Public

The Judicial Conference Committee on Court Administration and Case Management discussed at their meeting last summer problems of public access to the CJRA reports and plans prepared by the district court advisory groups. Subsequently, the Federal Judicial Center contacted both West Publishing Company and Mead Data Central, to explore whether these companies would be interested in placing the CJRA documents on-line through their electronic access services. West Publishing Company agreed to create a CJRA database within WESTLAW. All reports and plan from the early implementation districts will be available once the database is operative, and the reports and plans from the non-EID districts will be made available as they are completed. The Model Civil Justice Expense and Delay Reduction Plan prepared by the Judicial Conference, as well as the annual assessments performed by the district courts and reports to Congress, will also be placed on-line. West Publishing Company has committed to have this service available on WESTLAW this spring, perhaps by as soon as the end of this month. Mead Data Central also has indicated some interest in providing the same service on LEXIS; they are still exploring the feasibility of creating a database for this purpose.

EXHIBIT I

COURT-SPONSORED ALTERNATIVE DISPUTE RESOLUTION PROGRAMS

ARBITRATION

Mandatory Pilot Programs:

Northern District of California
Middle District of Florida
Western District of Michigan
Western District of Missouri
District of New Jersey
Eastern District of New York
Middle District of North Carolina
Western District of Oklahoma
Eastern District of Pennsylvania
Western District of Texas

Voluntary Pilot Programs:

District of Arizona
Middle District of Georgia
Western District of Kentucky
Northern District of New York
Western District of New York
Northern District of Ohio
Western District of Pennsylvania
District of Utah
Western District of Virginia
Western District of Washington

Other Programs (both voluntary):

Eastern District of California
Southern District of Ohio

MEDIATION

District of Columbia
District of Connecticut
Middle District of Florida
Eastern District of Pennsylvania
Western District of Washington
Eastern District of Washington

MINI-TRIALS AND MINI-HEARINGS

Western District of Michigan

SUMMARY JURY TRIALS

Central District of Illinois
Northern District of Indiana
Southern District of Indiana
Eastern District of Kentucky
Western District of Kentucky
Western District of Michigan
Northern District of Ohio
Southern District of Ohio
Northern District of Oklahoma
Western District of Oklahoma
Middle District of Pennsylvania
Middle District of Tennessee

EARLY NEUTRAL EVALUATION

Northern District of California
Eastern District of California
District of Columbia

SETTLEMENT JUDGE OR MAGISTRATE JUDGE

Northern District of California
District of Connecticut
District of Idaho
District of Kansas
Northern District of Oklahoma
Western District of Oklahoma
Middle District of Tennessee

SETTLEMENT WEEK

Southern District of Ohio
Northern District of West Virginia

CASE VALUATION

Eastern District of Michigan
Western District of Michigan

EXHIBIT II

Advisory Group Reports and Cost and Delay Reduction Plans

The following reflects the final reports and plans which were adopted by April 26, 1993 and submitted to the Administrative Office. All final reports and plans are due by December 1, 1993. Pilot courts appear in boldface.

1. Alaska
2. Arkansas Eastern
3. California Eastern
4. California Northern - Demonstration Court
5. **California Southern**
6. **Delaware**
7. Florida Southern
8. **Georgia Northern**
9. Idaho
10. Illinois Southern
11. Indiana Northern
12. Indiana Southern
13. Kansas
14. Massachusetts
15. Michigan Western - Demonstration Court
16. Missouri Western - Demonstration Court
17. Montana
18. New Jersey
19. New Mexico
20. New York Eastern
21. **New York Southern**
22. Ohio Northern - Demonstration Court
23. **Oklahoma Western**
24. Oregon
25. **Pennsylvania Eastern**
26. **Tennessee Western**
27. Texas Eastern
28. Texas Northern
29. Texas Western
30. **Texas Southern**
31. **Utah**
32. Virgin Islands
33. Virginia Eastern
34. West Virginia Northern - Demonstration Court
35. West Virginia Southern
36. **Wisconsin Eastern**
37. Wisconsin Western
38. Wyoming

Exhibit III

Alternative Dispute Resolution Profiles

Alaska: 9th Circuit

- Endorses the concept of ADR

Arkansas (Eastern): 8th Circuit

- Will inform the Bar about present ADR options

California (Eastern): 9th Circuit

- Established a panel to monitor the use of ENE, Court-annexed Arbitration and other ADR
- Encourages ADR

California (Northern): 9th Circuit
Demonstration Court

- ENE
- Non-binding arbitration
- Settlement Conference
- Summary jury trials and bench trials
- Special Masters
- Private ADR

California (Southern): 9th Circuit
Pilot Court

- Non-binding mini trial
- Summary jury trial -- in cases with less than $250,000 at controversy and a likelihood of resolution
- Non-binding arbitration/mediation in all contract cases and tort cases under $100,000.

Delaware: 3rd Circuit
Pilot Court

- Voluntary mediation
- Voluntary arbitration

Florida (Southern): 11th Circuit

- Voluntary mediation
- Any other type of ADR currently available

Georgia (Northern): 11th Circuit
Pilot Court

- Court-annexed arbitration -- mandatory/non-binding
- Mediation option
- Special masters

Idaho: 9th Circuit

- Voluntary, non-binding:
  - Settlement weeks -- neutral attorneys
  - Arbitration – where the amounts in controversy are less than $100,000.
  - ENE

Illinois (Southern): 7th Circuit

- A plan to educate the Bar in ADR alternatives

Indiana (Northern): 7th Circuit
Comparison District

- Private settlement negotiations encouraged
- Mini trials
- Summary jury trials
- Hosted settlement conference
- ENE

Indiana (Southern): 7th Circuit

- Encourage settlement
- Publicize and educate Bar in:
  - ENE
  - Mediation
  - Arbitration
  - Mini-hearings
  - Summary jury trials

Kansas: 10th Circuit
Comparison District

- Extra judicial proceedings encouraged
- Mediation
- Mini trials
- Summary jury trials
- Settlement conferences
- Other ADR procedures

Massachusetts: 1st Circuit

- Encourages:
  - Settlement
  - Mini trials
  - Summary jury trials
  - Mediation

Michigan (Western): 7th Circuit

- Strengthen existing ADR procedures

Missouri (Western): 8th Circuit

- Experimental Program - 1/3 automatic participation; 1/3 voluntary participation; 1/3 not encouraged to participate
- Mediation
- Non-binding arbitration
- ENE

Montana: 9th Circuit

- Judicial Officer must consider settlement conferences
- Mediation with mediators coming from a court established list

New Jersey: 3rd Circuit

- Arbitration
- Mediation, mini trials, and summary jury trials with outside providers

New Mexico: 10th Circuit

- Endorses the concept of ADR
- Maintain panel of neutrals and provide training

New York (Eastern): 2nd Circuit
Comparison District

- Court-annexed arbitration for amounts under $100,000
- ENE
- Trials before Magistrate Judges
- Settlement conferences
- Special Master
- Court-annexed mediation

New York (Southern): 2nd circuit
Pilot Court

- Mandatory court-annexed mediation for cases in the expedited track
- Voluntary court-annexed arbitration

Ohio (Northern): 6th Circuit
Demonstration Court

- ENE – any civil cases
- Mediation – any civil cases
- Arbitration
- Summary jury trial
- Summary bench trial
- Other ADR procedures

Oklahoma (Western): 10th Circuit
Pilot Court

- Settlement conference
- Mediation
- Court-annexed arbitration
- Summary jury trial

Oregon: 9th Circuit

- Settlement Judge
- Court-annexed voluntary mediation program
- Other local ADR services

Pennsylvania (Eastern): 3rd Circuit
Pilot Court

- A well established arbitration and mediation program
- Any other ADR method purposed by the parties or the presiding judge

Tennessee (Western): 6th Circuit
Pilot Court

- ENE
- Settlement conference
- Mini trials
- Summary jury trials
- Mediation

Texas (Western): 5th Circuit

- Expand existing ADR program
- Parties are required to submit ADR report in every case
- Bar applicants must certify familiarity with ADR
- Parties with settlement authority are required to attend ADR meetings

Texas (Northern): 5th Circuit

- ADR pamphlet
- Endorses ADR concept
- Judge may refer any case to ADR
- Options (all non-binding)
  - Mediation
  - Mini-trial
  - Summary Jury Trial
  - Other settlement procedures at the judge's discretion
- Parties with settlement authority are required to attend ADR meetings

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Texas (Southern): 5th Circuit
Pilot Court

- Mediation
- Mini trial
- Summary jury trial
- Arbitration
- Other ADR procedures

Texas (Eastern): 5th Circuit

- Court-annexed mediation
- Mini trial
- Summary jury trial
- Other

Utah: 10th Circuit
Pilot Court

- Will experiment with:
  - Mediation
  - Arbitration
  - Mini trial
  - Summary jury trial

Virgin Islands: 3rd Circuit

- Mediation

West Virginia (Northern): 4th Circuit
Demonstration Court

- Settlement Weeks

West Virginia (Southern): 4th Circuit

- Mandatory mediation

Wisconsin (Western): 4th Circuit

- ENE
- Mediation

Wisconsin (Eastern): 7th Circuit
Pilot Court

- Settlement conference
- Special Master
- ENE
- Mediation
- Arbitration
- Other ADR procedures

Wyoming: 10th Circuit

- Settlement Conferences
- ADR in appropriate circumstances

Mr. HUGHES. Judge Simandle.

STATEMENT OF JEROME B. SIMANDLE, JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Judge SIMANDLE. Thank you, Mr. Chairman and members of the committee. It is a privilege to be here before you.

I am Jerome B. Simandle. I sit in Camden, NJ, as a U.S. district judge, and I would like to share with you our experience in the District of New Jersey for the last 8 years as a court which has had a successful mandatory arbitration program.

New Jersey's judges and lawyers in 1984 and 1985 were confronted with a Federal court docket which had to devote extraordinary resources to the trial of criminal cases, and we still do. That is the backdrop under which our ADR program for mandatory arbitration was passed.

What we were searching for was a program that would provide speedy, inexpensive and just resolution of cases without the necessity of going to trial if the litigants were satisfied with the result. We believe we found that in the court-annexed arbitration program. There have been substantial contributions made to that program by the members of the bar who serve as arbitrators.

We looked at the needs of the litigants in the lower dollar value contract and tort cases. The arbitration itself takes place before a neutral attorney arbitrator. The result, as Judge Williams and Judge Schwarzer have emphasized, is nonbinding. It is a required step before trial in these sorts of cases which constitute about one-fifth of our civil docket. That is the only element that is compulsory for these cases. It is a step that must be taken in order to prepare the case, if it is going to go to trial.

Arbitration comes toward the end of the pretrial process. It is not something that truncates parties' rights to discovery and parties' rights to judicial rulings on dispositive motions on matters of law. All of that occurs before the arbitration is even scheduled.

Our district has very low disincentives to seeking trial de novo. There is only a $150 fee, and it is easily waived if a party is unable to afford it. It seems to the judges of our court that the disincentive to seeking trial de novo should come not from a high fee, but rather from the logic of the arbitration result itself. If there is a fair process that reaches a reasonable result, then we believe that parties will not demand trial de novo. We feel that that has indeed been the result, and I would like to just very briefly review the results with you.

Our program is marked by rising numbers of midlevel cases where the parties are consenting to voluntarily arbitrate. These are cases where there is more than $100,000 in dispute, in fact, cases of a quarter million, half a million, or even a million dollars have been placed into arbitration by the attorneys and the parties by consent. They do this because of the trust that they have in the program, and that trust has grown over the years.

The lawyers and the clients prefer mandatory arbitration to trial procedures in New Jersey for this type of case. That has been determined not only through the Federal Judicial Center's survey, but also through the oversight by two advisory groups, first, the Lawyers Advisory Committee for the district, and second, the Civil

Justice Reform Act Advisory Committee for the district, which informally questioned arbitrators' attorneys and their clients, and determined that the arbitration was highly successful and should be expanded as part of CJRA in our district.

Third, the lawyers and the clients perceive the procedures as fair both in concept and as applied to the individual cases. As a result, after approximately 10,000 cases have been placed into the arbitration program over the last 8 years, between 1 and 1.5 percent have resulted in a trial de novo. That contrasts with the court's rate in nonarbitration cases of approximately 5 percent of the cases going to trial. That means that a nonarbitration case in my district is three to four times more likely to go to trial than an arbitration case.

Finally, it is an opportunity for lawyers who sit as arbitrators to perform a public service. It is essentially a pro bono function. Although they are paid $250 that hardly compensates for the typical arbitration which can take half a day or even a full day, sometimes more.

Finally, I leave my remarks that have previously addressed the criticisms of second-class justice, or that somehow this places an undue burden on the rights to a jury trial. No judge in our district believes that that is even remotely true, neither do the litigants. In fact, it is an enhancement to the opportunities for justice that are otherwise available.

Mr. Chairman, based upon these experiences, I respectfully urge your committee to adopt H.R. 1102 and to report it favorably so that every Federal district court in the country will have the opportunity to consider whether it wishes to enact a mandatory arbitration program for itself.

Thank you.

Mr. HUGHES. Thank you very much, Judge.

[The prepared statement of Judge Simandle follows:]

PREPARED STATEMENT OF JEROME B. SIMANDLE, JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Mr. Chairman:

My name is Jerome B. Simandle. I am a United States District Judge for the District of New Jersey. I was previously a United State Magistrate Judge for the District of New Jersey for more than eight years, and my judicial duties included supervision of the District of New Jersey's Court-Annexed Arbitration Program which was commenced in March, 1985. I appear before you not as a representative of the Judicial Conference but as a Judge of a Federal Court having an active and successful compulsory court-annexed arbitration program. I offer this statement in support of the Court Arbitration Authorization Act of 1993, H.R. 1102. I thank the Committee for the opportunity to appear and testify.

I. STATUTORY CONTEXT

In 1984, the Lawyers Advisory Committee for the District of New Jersey proposed to the Court that it establish a court-annexed arbitration program, patterned largely upon the program of the Eastern District of Pennsylvania. On March 11, 1985, the Court adopted the Committee's proposal, enacting new Local Rule 47. New Jersey became one of eight, and later ten, test districts under the Judicial Conference's experimental program. Congress reviewed the success of these programs in 1988 and passed Title IX of the Judicial Improvements and Access to Justice Act of 1988 (hereinafter "the 1988 Act"), 28 U.S.C. §§651-658, authorizing the pilot courts—including New Jersey—to continue compulsory court-annexed arbitration programs, while authorizing ten other courts to adopt voluntary arbitration programs.

New Jersey is an example of a court with compulsory arbitration of certain cases with money damages not exceeding $100,000, under 18 U.S.C. §§652(a)(1)(B) & 658(1), coupled with the voluntary arbitration of other cases by consent of the parties under 28 U.S.C. §652(a)(1)(A).

Section 4 of the proposed legislation in H.R. 1102 would amend the Arbitration provisions of the 1988 Act to permit each Federal district court to choose to enact a compulsory or voluntary court-annexed Arbitration program by local option. This amendment would thus make the benefits of compulsory and voluntary arbitration available to the additional district courts which choose to do so.

Based upon the eight years of experience in New Jersey, as well as in the other Federal courts with compulsory arbitration, this amendment is well-justified. Further, I am confident that the parties, lawyers and judges experienced in Federal compulsory arbitration would also strongly support this opportunity for other federal courts to adopt these procedures for resolving civil cases. In the District of New Jersey and elsewhere in courts with mandatory arbitration, the District Judges and Magistrate Judges seem to overwhelmingly be of the view that this program enhances the delivery of justice and should be made available to other courts.

I will briefly describe how Arbitration works in our Court, then I will analyze the results of Arbitration in quantitative terms and in terms of litigant satisfaction, and I will briefly address the common misconceptions about compulsory arbitration.

II. COURT-ANNEXED ARBITRATION IN THE DISTRICT OF NEW JERSEY

Cases Receiving Compulsory Non-Binding Arbitration.—Under General Rule 47 of the District of New Jersey, the Court provides compulsory but non-binding arbitration for civil cases in which money damages only are being sought in an amount not in excess of $100,000 exclusive of interest, costs and punitive damages, except for claims of constitutional rights, tax refunds or Social Security appeals. (General Rule 47C.3, consistent with 28 U.S.C. §652(b)). Arbitration cases comprise about 20% of our civil docket. A case will be exempted from arbitration if it involves complex or novel legal issues, or if legal issues predominate over factual issues, or if other good cause is shown why specific policy concerns make arbitration inappropriate. (General Rule 47D.6, consistent with 28 U.S.C. §652(c)). Such applications to remove a case from Arbitration are rare.

Case Management, Motion Practice, Scheduling.—The Arbitration case proceeds through the same sort of early case management as other civil cases. First, the attorneys (or unrepresented parties) meet with the assigned Magistrate Judge in the Scheduling Conference, usually within 60 days after the first answer is filed. The litigants discuss the contours of claims and defenses, each party's discovery needs, any unusual problems requiring judicial intervention, the appropriateness of arbitration, and whether the case can be resolved by settlement. Arbitration is incorporated into our Court's CJRA Plan which identified an Arbitration Track beginning with the initial Scheduling Conference before the Magistrate Judge and aiming to have the case prepared for its arbitration hearing within six months. The resulting Scheduling Order, assuming that the case remains in the Arbitration Track, will set deadlines for completing discovery and filing of dispositive motions, followed by the presumptive Arbitration hearing date. When the discovery period has passed and any case dispositive motions have been decided, the Court schedules the case for its Arbitration Hearing.

Selection of Arbitrator.—The Clerk selects the single Arbitrator from the Court's list of certified Arbitrators. (General Rule 47D.2). An Arbitrator is compensated $250 by the Court for service in each case, and additional compensation can be sought if the hearing is protracted. (General Rule 47B). Requests for excess compensation are extremely rare, even though it is not unusual for a hearing to take an entire day. The Arbitrators are attorneys in private practice, experienced in federal litigation, and further seasoned by experience as Arbitrators or as lawyers in such matters.

Pre-Hearing Submissions.—The litigants submit certain background documents to the Arbitrator, such as proposed exhibits and expert reports, prior to the hearing. (General Rule 47E.5). The Arbitrator normally convenes a short pre-hearing conference call to discuss the agenda for the hearing and to resolve hearing-related problems.

Arbitration Hearing.—The Arbitration hearing is conducted before a single Arbitrator in a manner similar to a bench trial. The purpose is to provide a full and fair hearing before an experienced neutral attorney who serves as a "non-jury adjudicator of the facts based on evidence and arguments presented at the arbitration hearing." *Guidelines for Arbitration* at Appendix M to the General Rules, II.B. This means that the Arbitrator is not a mediator or settlement judge, and he or she may

decline to entertain settlement discussions. The Court has made clear that it "expects that the arbitrator and counsel shall strive at all times to preserve the essential functions of a finder of facts at a hearing, which though less formal than a trial, nonetheless inspires similar confidence in the objectivity and validity of the fact finding process," according to *Guidelines for Arbitration* § II.B.

The parties usually testify at the hearing and other evidence is proffered using the Federal Rules of Evidence as a guide. General Rule 47E.5. A typical Arbitration hearing takes 4-8 hours, depending on the complexity of the case and number of parties. Each party is required "to participate in the arbitration process in a meaningful manner" (General Rule 47E.3), and in practice it is extremely rare that a party fails to appear and participate.

Written Arbitration Award.—Within 30 days after the hearing, the Arbitrator must render an Arbitration award concisely stating the result, accompanied by a written statement or summary setting forth the basis for the award. If no party timely objects to the Arbitration award, it is docketed as a final judgment (General Rule 47F, consistent with 28 U.S.C. § 654(a)).

Rejecting the Award by Requesting Trial.—A party has 30 days to reject the award by demanding trial de novo, or 60 days in cases involving Federal employees and agencies. (General Rule 47G.1). The party demanding trial de novo posts a deposit of $150 with the Clerk except that a person proceeding in forma pauperis pays no fee. The case is then returned to the active trial list and scheduled for its final pretrial conference and trial. (General Rule 47G.2). The $150 deposit is returned if the party obtains a final judgment more favorable than the award, or if the de novo request was made for good cause. (General Rule 47G.3).

III. ARBITRATION PROGRAM PERFORMANCE AND SATISFACTION OF LAWYERS AND PARTIES

The high hopes for court-annexed Arbitration—both compulsory and voluntary—in the District of New Jersey have been borne out by experience. For the statistical years 1986–1992, over 10,000 civil cases were placed into the Arbitration program in our Court. Of those cases, almost all were resolved by motion practice, withdrawal, pre-Arbitration settlement, acceptance of the Arbitration award, or by settlement after the award. Through 1991 (the most recent year in which the statistic has been compiled), only one percent (1%) of these cases had to be tried to a verdict. The tracking of Arbitration cases for the two most recent years shows the following:

TABLE 1.—ARBITRATION IN DISTRICT OF NEW JERSEY

	1991	1992
Number of Cases Placed in Arbitration	1,154	1,694
Total of Cases Pending in Arbitration	1,016	1,287
Cases Closed Prior to Appointment of Arbitrator	697	974
Cases Arbitrated or Settled After Arbitrator Appointed	282	242
Requests for Trial De Novo	149	144
De Novo Requests Closed Before Trial	122	128
Cases Left for Trial or Tried to Completion	27	16

If one averaged the experience for these two years, one finds that for every 100 cases placed in the Arbitration program, 58.7 are closed before an Arbitrator is appointed, as a result of early case management, settlement, or motion practice. This leaves 41.3 cases to be scheduled for the Arbitration hearing.

Of these 41.3 remaining cases only 10.3 will result in a request for trial *de novo*. Of the 10.3 cases that are restored to the docket, 8.8 cases will be closed before trial, usually by settlement, leaving 1.5 cases to be tried to a verdict. The actual number of trials will be even less where, for example, a case is reflected as awaiting trial but is in fact stayed pending developments in another forum, such as bankruptcy court.

In other words, almost 90 percent of the Arbitration program cases are resolved without requesting trial de novo, and approximately 99 percent are resolved without trial.

While the number of civil case filings decline by one percent from 1991 to 1992, the number of cases placed in Arbitration increased by almost 47 percent. This growth can be explained by a substantial increase in civil cases voluntarily submitting to Arbitration. These voluntary submissions reflect growing trust by attorneys and clients in the fairness and efficacy of the Arbitration program because of its

track record. Thanks in large part to the successful Arbitration efforts, the median time for disposition of civil cases in New Jersey was shortened to only seven (7) months. Of courts in the Third Circuit, only the Eastern District of Pennsylvania—which is the only other mandatory arbitration district—has a comparable speed of resolving civil cases.

Indeed, in 1992, after reviewing the success of the Arbitration program, the District's Civil Justice Reform Act (CJRA) Advisory Committee, in its annual assessment, proposed an expansion of the Court's alternative dispute resolution (ADR) programs to establish a process for court-annexed Mediation of complex cases. Widespread satisfaction with the Arbitration program was cited as a key reason for the expanded Mediation proposal, which the Court unanimously adopted in December, 1992.

The high degree of satisfaction with the fairness of Arbitration is shown not only by the findings of the CJRA Advisory Committee, but also in survey data of the actual participants. The Federal Judicial Center, as part of its responsibilities under the 1988 Act, surveyed the participants in the compulsory Arbitration program in the District of New Jersey, and in the nine other pilot courts. *See* B. Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center 1990) [hereinafter "FJC Report"].

The FJC Report found that the actual litigants—lawyers and clients—in the compulsory, non-binding arbitration program in New Jersey expressed a high degree of satisfaction with the opportunity to arbitrate, as follows:

> When asked whether Arbitration procedures were fair, 97.8% of the parties and 94.7% of the attorneys agreed or strongly agreed. (FJC Report at pp. 64 & 68).
>
> A large majority of attorneys (93.8%) approved the concept of the district's Arbitration program. (FJC Report at pp. 77-78.)
>
> More than half (58%) thought Arbitration saved time in resolving the case, and 64% were confident Arbitration reduced costs. (FJC Report at pp. 86-87.) More recently, in December, 1991 the Court created the Arbitration Track under its CJRA Plan to improve the speed of arbitration cases.
>
> Most parties (79%) found the costs of Arbitration to be reasonable. (FJC Report at p. 90.)
>
> It is most revealing that 73% of parties and almost 64% of attorneys either *preferred compulsory Arbitration to jury and non-jury trials or said it makes no difference.* (FJC Report at p. 70-73.)

The FJC Report shows that New Jersey's experience was similar to that in the other pilot courts. In summary, a compulsory Arbitration of lower-dollar value cases in this Court usually brings about a satisfactory resolution under procedures that are seen as fair. Arbitration is regarded as either comparable or preferable to a trial by large majorities of the participants. Assignment to the compulsory arbitration program will typically resolve the case in somewhat less time, at less cost and with greater litigant satisfaction than standard pretrial and trial processes.

IV. SOME UNFOUNDED CRITICISMS OF COMPULSORY ARBITRATION

Experience clearly shows that success of compulsory court-annexed arbitration of lower-dollar value cases in New Jersey and elsewhere, as measured by both enhanced resolution of cases without trial and participant satisfaction with the fairness of the process. Despite this, some critical views persist among a few academics and traditionalist judges who assert that courts should provide only trials, and not arbitration or other ADR methods, to resolve civil litigation. I am unaware of such criticisms arising from Federal judges and participants in courts that actually have compulsory arbitration programs. Abstract assertions about such programs should be examined against the actual experiences of the participants in these programs, rather than through setting up artificial critiques that ignore experience.

Drawing upon New Jersey's eight-year-old program, these misconceptions may be addressed and dismissed:

(1) "Federal arbitration programs provide second-class justice." Arbitration cases actually receive more attention, because they have the same opportunities for appropriate pretrial discovery, motion practice, conferences with the court, and judicial intervention if necessary, augmented by the arbitration hearing before a skilled neutral arbitrator, concluded by trial if the case is not otherwise resolved. If arbitration is "second class," why is it the preferred mode of court process for these cases when compared with a jury trial or bench trial? Arbitration is viewed instead as one more opportunity to administer justice in a manner reducing costs and delays for most litigants while providing a more satisfactory outcome than the all-or-nothing trial.

(2) "An arbitration hearing is not a trial." That's correct, and that's just the point. A trial can be a costly, inefficient and unsatisfying "winner-take-all" method of resolving non-complex civil litigation. With live testimony of parties, augmented by documents and summaries of anticipated testimony and arguments of counsel, the arbitrator can fairly evaluate the essence of the dispute in a fraction of the time and expense. The arbitrator has more flexibility in scheduling to accommodate parties' needs, compared with a busy trial judge. The arbitration hearing in this Court has nonetheless proved to be a reliable predicter of trial outcomes, because the arbitrator is usually a seasoned attorney who reviews such facts as would be admissible at trial, using the Federal Rules of Evidence as a guide. Moreover, by providing such Arbitration hearing opportunities, the court is providing a neutral, trial-like evaluation process to hundreds of cases that could not be reached for trial given the crowded civil and criminal dockets.

(3) "Compulsory arbitration deprives parties of the jury trial right." The term "compulsory" is misunderstood. The arbitration process is a "compulsory" procedure for a category of civil cases, but the result of the procedure is a non-binding award. Rejection of the award automatically results in the case being listed for trial as if the arbitration never occurred. At worst, in about ten percent of the cases placed into the Arbitration program, the listing for trial is delayed for the short time consumed by the Arbitration hearing. The other 90 percent are resolved without any request for trial de novo. Further, cases will be exempted from arbitration where the process is inappropriate. Experience teaches that Arbitration does not burden the right to a jury trial; instead, it enhances the prospect that even a trial listing will be unnecessary because the parties will reach a satisfactory resolution.

(4) "The deposit for the trial de novo fee deters parties from trials." Our Court's trial de novo deposit is $150, which is even less than the $250 fee paid by the Court to the Arbitrator. The $150 deposit cannot possibly deter the conscientious demand for trial de novo in such cases because (a) the stakes are high, exceeding $50,000 in diversity cases, (b) the party's costs for almost any conceivable federal court trial are many multiples of $150, and (c) the deposit is refunded if the party improves its result at trial or for other good cause.

(5) "If arbitration is so satisfying, let parties choose it voluntarily." The compulsory non-binding arbitration program already is preferred by participants. It is apparently preferred because it is fair and well-known, and neither party derives an advantage from withholding consent to arbitrate. The mandatory arbitration assures parties—especially important for those of lesser means—of an experienced neutral arbitrator and reliable forum to reach an advisory determination of the merits of the case. The proposed legislation, in my view, wisely preserves to each court the option of instituting compulsory or voluntary arbitration programs, or none at all, in accordance with the local needs and legal culture. In New Jersey, not only have we heard no pleas against compulsory non-binding arbitration in several years, but we have growing instances of mid-level case litigants choosing to enter the program because of their familiarity arising from the compulsory process.

I thank the Committee for consideration of these views and respectfully urge passage of the Court Arbitration Authorization Act of 1993.

Mr. HUGHES. Judge Schwarzer, your testimony discusses in some detail the question of whether referral of a case to arbitration should be voluntary of mandatory. Isn't there a threshold question which we should first answer before addressing that particular question? Shouldn't we first determine whether a program of arbitration should be required in each district?

Judge SCHWARZER. Whether it should be required in each district?

Mr. HUGHES. Yes, sir.

Judge SCHWARZER. Well, the approach that the Civil Justice Reform Act takes is that the judges, and the lawyers, and the parties, that is the advisory groups should determine what is best for that district. There should be, probably, some alternate dispute resolution program in every district, although there are some that seem to be doing well enough without it.

But my own view is that it would be better to let the people in the district make this choice rather than dictate it from Washington. Allow them a broad range of options, and not preclude them

from adopting something which they think is useful but is not not authorized by law.

Mr. HUGHES. So you are saying that we should perhaps be requiring that some alternative dispute resolution program be in existence, but that each district should decide which is better for their particular needs in that district?

Judge SCHWARZER. Well, not quite, Mr. Chairman. The Civil Justice Reform Act requires the adoption of ADR programs in 10 pilot districts to test it out. As to the other 84 districts, all it requires is that the group, the judges and the lawyers, consider and decide whether they want alternate dispute resolution. Almost every district is deciding to have one.

But, for example, the Eastern District of Virginia, which is known as a rocket docket and gets their cases to trial very fast, has concluded that they don't need an ADR program. I don't think they should be forced to take one as long as the statistics show that they move their docket, and they move it well. But most districts will want a program of alternate dispute resolution, but whether it is going to be court-annexed mandatory arbitration, or mandatory mediation, or some other program ought to be left to the decision of those people on the scene in the light of local culture and needs.

Mr. HUGHES. If we determine from the empirical data that arbitration works, whether or not a district is moving cases, how can we determine whether or not they couldn't move cases even better if we had arbitration if it works in other districts? How do we determine we can't do it better?

I mean the data suggests, and your testimony confirms that arbitration does work. The New Jersey experience is a good example of it working. I grant you that there are some differences from district to district, and I understand the argument that you should be able to custom tailor mechanisms to move cases to a particular district. If we find that something is working within the system, however, why shouldn't we be requiring it?

Judge SCHWARZER. I guess there are two answers. One of them is, if it works, it ought sell itself. That is, it ought to be adopted on the merits and not because of Congress.

Mr. HUGHES. But we have some districts that won't experiment. I went through that with pretrial services. We had the same argument with pretrial services.

Judge SCHWARZER. I understand that there were three districts in the first 10 demonstration programs that didn't even try, but some things are good for one district and not another. The fact that it works in the 10 districts doesn't mean it is going to be good for every district.

Mr. HUGHES. We set up 10 demonstration programs in one of the tiers, it might have been the second tier of demonstration projects, and three districts didn't even try, refused to even try it.

Judge SCHWARZER. Well, I don't know that we want to talk about pretrial services.

Mr. HUGHES. I am sure you don't, but I would because I see the same thing developing all over again. I know it is tied up in whether or not we are intruding upon the judiciary's ability in their respective districts to decide what is best for them but, frankly, it sounds like deja vu to some extent with the demonstration dis-

tricts. Why couldn't we persuade, at least in the 10 demonstration districts of the second tier, to get those courts to try arbitration?

Judge SCHWARZER. I think we should do everything we can to persuade them. My own view is that when you tell courts and judges, you must do something, you are immediately going to run into resistance, and a good program will be tainted by its compulsory features. That is the politics of it, and there is going to be an awful lot of opposition to it.

You can, perhaps, force it down their throats, but I think there will be a problem about it, whereas, if you authorize it, I should think that it will not create any significant political opposition.

Mr. HUGHES. It seems to me that we don't have to give you any authority to try things. I understand, however, the Administrative Office of the U.S. Courts advised some courts that went to try arbitration that they could not. I don't know where that interpretation came from. It seems to me that we are not giving you very much when we say that you have the authority. You have the authority to try these now.

Judge SCHWARZER. One of the problems is that the Civil Justice Reform Act, in its reference to ADR programs, lists summary jury trials and mediation, but it omits arbitration. We raised that question with the Senate committee and, initially, they said, well that was an inadvertent omission. On second thought, they said, well, we deliberately left it out because it requires authorization.

So we are now in a somewhat ambiguous situation that led the Administrative Office to issue that opinion. We are stuck with it. We are stuck with the fact that Congress did specifically authorize those 10 districts, and some court might read a negative inference in that, that without authorization you can't do it. So it is important for us to have the authorization. We would like to have it. We would like to avoid the battles, the political and other battles that would be attendant on any effort to force the courts to adopt it.

Mr. HUGHES. Judge Simandle, I am familiar with the New Jersey experience, and it has been very successful. I have been persuaded that one of the reasons why it is successful in New Jersey is because it is a mandatory program.

Judge SIMANDLE. Mr. Chairman, I think that is right, and the second reason is that the judges and the lawyers, in the beginning, were onboard with this program. It wasn't like anyone was forcing them to do it. But, after a study of all the alternatives, they decided, we decided, that this was the way we wanted to go.

There has been, and I can say this, no resistance to the concept of mandatory arbitration in New Jersey, but I think a lot of that has to do with the fact that we had a choice to make to begin with. Once the choice was made, everybody who was in on that choice felt the obligation to do our best to make it work, and I think that is why mandatory has worked.

If there were an imposition or a requirement that a district must adopt arbitration, then I think Judge Schwarzer may be correct, that might be counterproductive in a particular legal culture or in a particular court that doesn't have the docket pressure that some other court has.

Mr. HUGHES. Robert Raven, who is chairman of the Standing Committee on Dispute Resolution of the American Bar Association,

is testifying today, and one of the recommendations that he makes in his statement is that we should encourage arbitration earlier than we do in New Jersey, for instance.

In New Jersey, as I understand it, the arbitration takes place after the completion of discovery, and it seems to me that he makes a very valid point that we should do it earlier in the process. He even suggests perhaps arbitration prior to the filing of a complaint. I am not so sure how that would work, but at least after the filing of an answer, and once the pleadings have been filed, that perhaps that is the time when we should be looking at arbitration as a way to resolve disputes.

What is your response to that?

Judge SIMANDLE. There is a lot to be said for some sort of an early evaluation and settlement process in every case that comes into Federal court. This takes place at the initial conference in our district before the magistrate judge, and in some other districts before district judges, and we take a hard look at whether the case can be resolved.

Arbitration might not be the appropriate vehicle at that very early stage, at least as arbitration is defined in my district. It is a trial like proceeding, and there hasn't been, necessarily, the gathering of evidence or the refining of the issues that is necessary in order to make it like a trial at too early a stage.

But other procedures could be tried at or about the time of the filing of the complaint, and I think that that might be the future of the Federal dispute resolution mechanism, that every party that comes into Federal court, barring emergency, would have to certify that they have made an attempt at one or more of a menu of dispute resolution techniques to resolve their disputes so that judicial intervention would not be required. I think that that is something that would make a lot of sense, and some of the CJRA districts have provided for a similar program.

This is a wonderful time, Mr. Chairman, for experimentation because what we are finding is that a lot of things work. There is a lot of good news out there in alternative dispute resolution, arbitration is just one item. Arbitration itself, though, might not be a good fit for the kind of procedure that should be done in the first month or two that a case is in the Federal court.

Mr. HUGHES. Judge Williams, did you want to comment?

Judge WILLIAMS. Yes. I appreciate your concern of courts that perhaps may be reluctant to get onboard. One of the reasons that I mentioned having this Westlaw available is that the good news will be available and will spread. The bar is, at least in our court, more and more becoming a national Federal bar. I think lawyers, when they find programs are effective in other districts, will get the word out in their own home districts.

With the Rand study that is going to be completed, I am hopeful that it will have a lot of good news, and I think the fact that we have these successful programs is going to extend, and the fact that 37 out of 38 districts that have plans now have ADR provisions or encourage ADR is an indication of what is going to happen in the future.

So I don't think it will be necessary, for the reasons Judge Schwarzer articulated, or good to make it mandatory or forced.

Judge SCHWARZER. Could I add a brief comment on that to carry out your thought?

Mr. HUGHES. Sure.

Judge SCHWARZER. Mr. Chairman, in November of this year, the Federal Judicial Center, together with Harvard University and the ABA Litigation Section, is producing a National Conference on ADR Programs, and we expect to have a judge from virtually every district there for the purpose of talking about identifying and designing, implementing and operating the most effective ADR programs. We think that is going to give a real push to the implementation of appropriate ADR programs in every district in the United States.

Mr. HUGHES. I think that the perception in some quarters that arbitration or other ADR provisions afford second-class status to certain citizens is something that we faced in New Jersey 8 years ago before it was tried. I don't know that any studies have been done, it would be interesting to do that. It would be very difficult at this point to do it, but my own perception is that it was a problem at the bar in New Jersey.

The data that you have supplied, that 97 percent of the districts that are utilizing arbitration support arbitration, suggests to me that the ones that are not supporting it are the ones that haven't tried it.

Judge SCHWARZER. I think that is true.

Judge SIMANDLE. Yes.

Judge SCHWARZER. That is certainly what the record shows, and actually it is a very small but vocal minority that oppose it on the theory that it adds another layer of litigation. But the fact is, in these small cases, it isn't an added layer, it is the only layer.

Mr. HUGHES. How much of it is that somebody is trying to tell them how to run their court?

Judge SCHWARZER. I don't think so.

Judge SIMANDLE. No.

Judge SCHWARZER. Nobody is telling them they have to adopt mandatory court-annexed.

Mr. HUGHES. That is your concern about mandatory?

Judge SCHWARZER. That's right.

Mr. HUGHES. The gentleman from California.

Mr. MOORHEAD. Thank you.

On the next panel, Ronald Sturtz will be testifying, and in his statement on behalf of the Section of Litigation of the American Bar Association, he indicates, from the information received as a result of their informal requests, a number of attorneys in districts with court-annexed arbitration have recommended that cases having higher threshold limits of more than $100,000 be mandated in the program.

I would be interested in each of your thoughts as to whether Congress should consider raising the $100,000 threshold to include some of those cases?

Judge SCHWARZER. I would like to see it raised to $150,000. That is the limit that is now in effect in the Northern District of California, my district. The others are all at $100,000. I think with inflation and the decline in value of money and the increase in the stakes since the time the program started in 1978, I think it would

be appropriate at least to raise it to $150,000. I think if you get much beyond that, you are going to encounter more opposition.

Judge SIMANDLE. Congressman Moorhead, I would support and our district, I believe, would support Congress raising the ceiling, and perhaps a figure of $200,000 would be reasonable.

There is not that much conceptual difference between a $100,000 case and a $200,000 case in Federal court. The issues don't automatically become twice as tough, and it doesn't automatically take twice as long. In fact, there is almost no difference as a practical matter to the processing. If you have a good program, there is no reason that it can't process the case, if it is worth a quarter of a million dollars.

That is what has happened in my district, sir, and we have more and more litigants in those sorts of cases volunteering to go into the program and with some success. I am sorry I don't have the data to see whether those voluntary cases are resulting in the same success as the cases under $100,000, but it is my impression that the figures would be pretty close.

Mr. MOORHEAD. Judge Williams.

Judge WILLIAMS. Yes, I agree with Judge Simandle, although the Conference doesn't take a position on that, and I want to make that clear. That is just my personal view. I think you could go to $200,000 and that would not create a problem.

I think that if you go much higher than that, as Judge Schwarzer said, there will be more resistance, but I think $200,000 is reasonable given inflation, and given the cases that at least we see in the Northern District of Illinois, our contract-tort type cases that would fit into ADR and the number of cases we see in that $100,000 to $200,000 range, I think would be appropriate.

Judge SIMANDLE. Mr. Chairman.

Mr. HUGHES. Yes.

Judge SIMANDLE. Mr. Moorhead, if I may just add, by increasing the cap, you would still be preserving the local option to choose a lower cap, so if there was a little less confidence in the program or a little more resistance, certainly a district could set a low cap. New Jersey started at $50,000, we moved up to $75,000, now we are at $100,000. So I think other districts might have the same experience.

Mr. MOORHEAD. Along that same line, I know this question has been somewhat answered, but not in great detail, did the three districts that were authorized to set up voluntary arbitration programs offer any real explanation of why they didn't, or is it just something that happened?

Judge SCHWARZER. Why they did not?

Mr. MOORHEAD. Yes.

Judge SCHWARZER. I can't give you an answer to that. All I can say is that in those districts where voluntary arbitration programs are in operation, they have not attracted any support, very, very few cases, and I suspect that other districts got the message and decided it is not worth doing.

If lawyers can agree on voluntary arbitration, they can also settle the case, or do most anything, so it doesn't serve a useful purpose.

Mr. MOORHEAD. Judge Simandle, in your statement, you indicate that while the number of civil case filings declined by 1 percent

from 1991 to 1992, the number of cases placed in arbitration increased almost 47 percent. You go on to say that this growth can be explained by a substantial increase in civil cases voluntarily submitting to arbitration.

What special steps does your court take to promote its arbitration program and to be so successful in getting lawyers to go into it?

Judge SIMANDLE. It is discussed at the initial conference in each civil case of whether arbitration or some other ADR method ought to be attempted. With the growth of the arbitration program, it just seems natural for a lot of the litigants to ask that their case be tacked on, and I think that that really started to happen in 1991 and 1992, and I think the trend has continued.

Mr. MOORHEAD. It seems to be working.

Judge SIMANDLE. It does seem to be working, and the statistic that I personally care about the most isn't how many cases are we closing, it isn't even how fast are we closing them, but it is rather how satisfied are the litigants with this process, do they think that it is fair, have they gotten a fair shake, have they put this dispute behind them so that there doesn't have to be a trial and then an appeal. The answer is, yes, in the vast majority of cases, the litigants have been satisfied with the fairness and with the result.

Mr. MOORHEAD. Thank you very much.

Mr. HUGHES. The gentleman from Florida.

Mr. MCCOLLUM. Thank you very much, Mr. Chairman.

I am kind of curious if any of you can give me an idea of whether or not any of the other alternative dispute resolutions are really working?

Obviously, it appears to us from listening to what you have said today that the mandatory arbitration is by far and away the most effective because you obviously get the result. You are forcing it to happen, and that seems to be OK assuming that the attorneys involved accept all of this in good humor, which I am sure they do. However, there are so many other programs besides just the voluntary arbitration which you responded to a moment ago, the mediation, and so on. How effective are the other tools compared to the mandatory arbitration?

Judge SCHWARZER. If I may respond, the two major programs in operation in many districts are mediation and what is known as early neutral evaluation. In a number of districts, mediation is mandatory.

For example, Mr. McCollum, in your State, the State courts have long had a program of mandatory mediation, which I am told is very successful and I think there will be an effort made to translate it into the Middle District of Florida.

In many areas, mediation is voluntary, voluntary in the sense that the judge at the initial conference is likely to say, I want you people to go to mediation, and they will go to mediation, but it is not formally compulsory.

Early neutral evaluation is still in the experimental stage. In my district, what has been done is, every odd case goes to early neutral evaluation and every even numbered case goes straight through, and the preliminary results are that it is very effective and very

favorable period. They are adopting it now in the District of Columbia.

That is a program such as Judge Simandle described where lawyers meet with the parties and the lawyers in the case early on, right after filing, to try to identify the issues and see what common ground there is, and that may be leading on to settlement.

So mandatory court-annexed arbitration is not the only program. It is a good program, but there are other good programs, and it is appropriate to decide in each district what is best.

Mr. MCCOLLUM. But the mandatory feature is a tool that is almost essential to making it really work in each of these cases. Is that correct?

Judge SCHWARZER. That is what it comes down to.

Mr. MCCOLLUM. Do you presently—I shouldn't say do you, do the courts presently, the Federal district courts, have the authority, have we given them the authority or do they have it otherwise inherently, to have these other options as mandatory as opposed to voluntary?

In other words, is mandatory mediation authorized?

You came here worrying about whether you technically have the authorization for the mandatory arbitration, do they have the authority for the mandatory mediation, and other mandatory alternative dispute resolution programs?

Judge SCHWARZER. That question is not easily answered. The authority would have to be found in the inherent power of the courts to manage their business. The seventh circuit held that the courts did not have authority to compel parties to go to summary jury trial. A summary jury trial is a more demanding and more expensive procedure than mediation.

But there is a question of whether courts will necessarily acknowledge the existence of the power to compel people to go to a mandatory settlement process, and there is something to be said for Congress specifically authorizing the adoption of mandatory programs. The only instance of that so far is the court-annexed arbitration in 10 districts.

Mr. MCCOLLUM. What I was getting at is exactly that. I was wondering if what we were doing in broadening this, if we passed legislation, if it shouldn't include more than arbitration. Are we adequately addressing that in the proposed legislation?

Judge SCHWARZER. The proposed legislation doesn't address it. The question is whether more elaborate legislation could pass in time to prevent the sunset provision from going into effect. It may be that a two-stage process would be appropriate.

Mr. MCCOLLUM. Judge Simandle, do you have a comment on that?

Judge SIMANDLE. Yes, Congressman McCollum. The Rand study which is being done is looking at all sorts of ADR in the Federal courts, and we will have the benefit of their results in 1995, and three of the courts that they are looking at very intensely happen to be mandatory arbitration courts. Those are the Eastern District of Pennsylvania, the Eastern District of New York, and Western District of Oklahoma.

We will be able to look at arbitration as compared with the other ADR methods. It may be that some will prove to have been even

more successful, for instance, mediation. What I would respectfully suggest is, before any other type, other than arbitration, were to be made mandatory, that we should await the results of the Rand Corp. study so that we can see whether they do, in fact, work, or whether it would not be efficacious. My hunch is, we will see that many of these other modalities work very well.

Mr. MCCOLLUM. Now, when you say wait, if we just authorize this as opposed to mandating the courts to use it, what harm would there be in not waiting?

Judge SIMANDLE. Perhaps there would be no harm at all because you would put the option in, I think, the appropriate place, which is in the local district court to decide what is best for them, within the broad outline and the authority that the Congress gives to us.

The local legal cultures are very different from place to place around the country. In some places, there is still a fair amount of resistance, although not many, and I think that that is the note of caution that ought to be sounded with respect to other mandatory programs.

Mr. MCCOLLUM. Judge Williams.

Judge WILLIAMS. Yes, and I think that it is good to consider having that authority made clear to the courts. I will give you an example, again, in the seventh circuit, I think this was 3 or 4 years ago, one of the panels determined and reversed a judge who ordered parties to come in for a settlement conference.

It went up to the court of appeals en banc and it was reversed, and we were given that authority, and the court relied on the inherent authority of the courts to bring in parties to discuss settlement, but that is an example of what Judge Schwarzer noted, that it is not entirely clear, and we had to get an en banc panel decision in order to get that authority. So I think it could be helpful. I think timing is a factor in terms of the sunset provision, and that would be——

Mr. MCCOLLUM. Do any of you anticipate that there would be any organized opposition to just simple authorization of these other alternative dispute programs to be mandatory, rather than mandating that they be implemented?

Judge SCHWARZER. Well, there is a school of thought among judges and lawyers that any kind of mandatory ADR procedure results in the addition of another layer in the litigation process. They oppose it as an obstacle to access to jury trials. They are not familiar with the facts, but they have a philosophical view on it, and that is what caused the action in the Judicial Conference.

There will be opposition. I don't think it will be very powerful, but it will be there.

Mr. MCCOLLUM. Well, part of what I was getting at is, if we were to do something with this vehicle that we are now considering, would that put it in harm's way because it goes further than the limited role the bill is now designed for?

Judge SCHWARZER. There won't be as much opposition to mandatory mediation and mandatory early neutral evaluation as there has been to mandatory court-annexed arbitration. I think that will be more acceptable.

Mr. MCCOLLUM. Thank you very much.

Thank you, Mr. Chairman.

Mr. HUGHES. The gentleman from North Carolina.

Mr. COBLE. Thank you, Mr. Chairman.

It is good to have you all with us this morning.

Judge Schwarzer, you may recall that last year a witness for the Department of Justice testified before this subcommittee——

Judge SCHWARZER. Stuart Gerson.

Mr. COBLE. Pardon?

Judge SCHWARZER. Stuart Gerson.

Mr. COBLE. That is correct, I think. Yes, that is right. I am going to quote what was said: "Enthusiasm for a particular alternative dispute resolution technique has led to its use as a litigation tactic. Time consuming procedures for alternative dispute resolution are sometimes followed in cases where principal disputes on jurisdictional or legal issues make settlement a very unlikely prospect."

I would ask you three whether you are aware of any instances where ADR has been misused to extend or prolong proceedings and, if so, do you find it to be a significant problem?

Judge SCHWARZER. I haven't heard of it as a problem. Court-annexed mandatory arbitration, for example, moves on a very fast track. You have volunteer lawyers hearing the arbitration, and they maybe get $100 or $200, they have no incentive to drag it out, and there is no reason for them to give lawyers an opportunity to drag it out, and it is generally scheduled early on under the rules. It has to occur within 100 days or so.

Similarly, mediation can be cut off any time. I don't think that it is a likely candidate for abuse. It is true that every lawyer knows that sometimes you can drag on a case by settlement negotiations, but these ADR procedures themselves, I don't think, offer a vehicle for obstruction and dragging on.

I think that there are bigger problems in voluntary arbitration where people go to arbitration instead of litigation, and sometimes arbitration cases get out of hand, but that is not what we are talking about here.

Mr. COBLE. Judge, I did not mean to imply that that was my conclusion. I did not think so. I just wanted to get it on the record, and wanted to hear from you all. That is the answer I anticipated.

Does anybody else want to be heard on that?

Thank you, Mr. Chairman.

Mr. HUGHES. Thank you.

I am curious about the New Jersey experience, and the question of whether or not any districts throughout the country are experimenting with arbitration at an earlier stage of the proceedings than after discovery has been completed?

Judge SCHWARZER. The report indicates that the rules vary. I don't have the page here, but, generally speaking, arbitration occurs, I think, in my district, about 90 to 120 days after either filing or in the cases at issue. So it is not my experience that arbitration is deferred until discovery is completed, quite the contrary, it occurs after only a limited amount of discovery has taken place.

Mr. HUGHES. I think that the Rand study might be even more instructive if they looked at a number of districts, and looked at what the experience has been with variations of arbitration.

Your belief is that that is being done, that it does vary from district to district?

Judge SCHWARZER. Yes.

Judge WILLIAMS. Let me just make one comment also. We have reviewed in our committee—well, we had to review the 38 plans that have been submitted, and in almost every instance, there is some procedure in the district where, as Judge Simandle described, a judge or a magistrate judge sits down with the parties and plans how the case is going to proceed. So there is an early look by a judicial officer to determine what track a case should be placed on.

So, I think, even in situations like Judge Simandle's, as he articulated, there is that tough look at the case at the outset, so you don't have a case just lingering waiting for arbitration or some other phase. I think that is in almost every plan we have reviewed.

Mr. HUGHES. I appreciate that. Thank you.

As a general rule, what has been the participation of the U.S. Government in the alternative dispute resolution program?

Judge SCHWARZER. In my experience, when we first instituted the program in San Francisco, there was considerable resistance, but we managed to overcome that, and since the Executive order issued by the last administration, about 2 years ago, the Government favored participation in ADR programs, I think, from what I can see, the Justice Department has been fully supportive.

Mr. HUGHES. The original study also did indicate that the trial de novo demand rates as a proportion of the arbitration case load ranged from a low of some 7 percent in Northern California and Eastern New York to a high of 32 percent in Western Michigan.

Do you have any idea why there is such a disparity?

Judge SCHWARZER. Well, if you look at the report closely, there is a table on page 49 that shows that although 32 percent of all cases in Western Michigan had de novo demands, if you look at only the arbitration cases, the rate of de novo demands was the same as in Florida, and only slightly higher than North Carolina's. So I think it is a function of the input data. I don't think it reflects any particular dislike.

However, there is another situation in Western Michigan that is reported in footnote 45 on page 48, and that is that the district had a very successful mandatory mediation program before they instituted the arbitration program in 1985, and there was some resistance to the arbitration because people liked what they had before. That may explain some of the comparative dissatisfaction in Western Michigan compared to other districts.

Mr. HUGHES. I see. Thank you.

The current legislation exempts all civil rights cases from mandatory referral to arbitration. What are your feelings on this aspect of the legislation?

Judge SCHWARZER. Well, just speaking for myself, as an abstract proposition, it makes a lot of sense to include civil rights cases because it is a way to give civil rights plaintiffs an opportunity to tell their story to a neutral person, and many times that is all they want.

I think, however, that that amendment is likely to generate additional opposition to the legislation.

Mr. HUGHES. Judge Williams or Judge Simandle.

Judge WILLIAMS. Well, obviously, the Judicial Conference hasn't taken a position on it. So the Conference takes no position.

But I think that, particularly due to the nature of civil rights cases, there would be strong objection to putting it into arbitration cases. I agree with Judge Schwarzer, on a practical matter, it makes sense to put those cases in, but I think there would be a problem if they were included in many jurisdictions.

Judge SIMANDLE. Mr. Chairman.

Mr. HUGHES. Yes, Judge Simandle.

Judge SIMANDLE. I think that there is an additional potential problem. Legal issues often predominate in civil rights cases, issues like jurisdiction, qualified immunity, statute of limitations, and those would not be so appropriate for arbitration. Once those issues are sorted out by the judge, as they should be, then if it comes down to a fact issue of did this happen or did it not happen, it would be as appropriate for arbitration as any other case.

Mr. HUGHES. The purely voluntary programs in the original study did not appear to be very successful. Has their performance improved in the ensuing years?

Judge SCHWARZER. Our data on that are incomplete, but we don't have any data that indicate any improvement at all. The study is still going on.

Mr. HUGHES. The Department of Justice believes that under the principle of sovereign immunity, it cannot be held liable for cost or sanctions for demanding a trial de novo, either as a deposit in advance or as a penalty imposed after the fact under the statute as it presently exists.

Should we specifically make them liable so that all litigants have an equal playing field?

Judge SCHWARZER. Well, my view is that the Government is now liable for costs generally. I don't see why the Government shouldn't be paying arbitrators' fees as costs. It is a small amount, I don't see any reason to exempt them.

Mr. HUGHES. Judge Simandle, in New Jersey, you exempt the tax refund cases and Social Security appeals from mandatory arbitration. What is the rationale for those particular exemptions?

Judge SIMANDLE. Those areas of practice require expertise that the typical arbitrator might lack, knowledge of tax law, or knowledge of Social Security is not in the canon of the normal Federal litigator, and also Social Security cases are really not cases about damages as much as they are about entitlement to an award of benefits.

Mr. HUGHES. Thank you very much. You have been very, very helpful to us, and it is our expectation that we will try to move something in the near future. I know that you are going to take some of these issues back to the Judicial Conference, and we look forward to hearing from you. Our timeframe is possibly reporting out something hopefully by summer recess, which is the early part of August.

Thank you very much, we really appreciate it.

Judge WILLIAMS. Thank you very much.

Judge SCHWARZER. Thank you, Mr. Chairman.

Judge SIMANDLE. Thank you, Mr. Chairman.

Mr. HUGHES. Our first witness in the second panel is Robert D. Raven, who is chairman of the Standing Committee on Dispute Resolution of the American Bar Association. Mr. Raven has been

very active in the ABA for many years, including participating as the chair of the ABA Standing Committee on the Federal Judiciary, the Standing Committee on the Legal Aid and Indigent Defendants, and as chair of the Committee on the Trial of Antitrust Cases of the Section of Litigation. He has also served as president of the Bar Association of San Francisco, the State Bar of California, and of the American Bar Association. Mr. Raven is in the private practice of law in Los Angeles with the firm of Morrison & Forester.

Our second witness on the second panel is Ronald M. Sturtz, who is a member of the law firm of Hannoch Weisman of Roseland, NJ. Mr. Sturtz appears today on behalf of the Section of Litigation of the ABA. Mr. Sturtz is very active in the alternative dispute resolution field. He is presently chair of the Arbitration Committee, and has been vice chair of the Alternative Dispute Resolution Committee of the ABA. He is also a member of the New Jersey Supreme Court Dispute Resolution Committee, and part of the team that authored the Supreme Court of New Jersey's complementary dispute resolution rules. He has been in the private practice of law in New Jersey for about 35 years.

We welcome both of you this morning. We have your very excellent statements and, without objection, they will be made a part of the record, and we hope you can summarize for us.

Why don't we begin with you first, Mr. Raven, welcome.

STATEMENT OF ROBERT D. RAVEN, CHAIRMAN, STANDING COMMITTEE ON DISPUTE RESOLUTION, AMERICAN BAR ASSOCIATION

Mr. RAVEN. Thank you, Mr. Chairman. I will try to be pretty brief. I think I can do it in 5 minutes, or something like that. If I get longer, just cut me off.

The ABA Standing Committee on Dispute Resolution supports H.R. 1102 making ADR available to more of the district courts. Such a step in court-annexed ADR would parallel the explosive growth of ADR outside the court system, and I wanted to give you three quick examples of how it is moving outside of the court system.

First, the American Arbitration Association, last year, in 1992, disposed of 61,000 disputes, 61,000 disputes compared to 22 trials per Federal judge. That is nearly a 100-percent increase in 10 years.

The Center for Public Resources, a nonprofit group in New York that works with lawyers and many corporations on ADR, has a corporate pledge that I am sure you are familiar with, if a corporate member signs that pledge, they pledge that before they sue any other member who has signed that pledge, they will meet with them, talk about it, try some ADR procedure. Six hundred of the Nation's largest corporations, and 1,800 of their subsidiaries have signed that pledge. These companies account for more than half of the gross national product of this country.

The CPR also has a law firm pledge that I helped put in place, and that law firm pledge pledges the law firm that signs it to two things, one, to bring all of their lawyers up to speed in ADR so that they can advise clients on it, and then, where appropriate, and we had a great fight about that word, where appropriate, to counsel

clients with respect to ADR. Already 1,425 law firms, 400 to 500 of the largest law firms in this country have signed that pledge.

Then, third, I think the history of our committee shows the tremendous growth. We started 17 years ago, a Special Committee on the Resolution of Minor Disputes. That is where we started. Now, at the midyear meeting in Boston in February, this past February, the house of delegates went along with our proposal that the standing committee become a section, and I was able to tell the house that we had gone out and asked lawyers and nonlawyers to sign declarations of intent that they would join the section, if it became a section. We had over 5,000 declarations of intent that we were able to pick up in our little committee and present to the house, over 5,000 lawyers and nonlawyers said they wanted to join that section.

So that is just an example of how quickly it is moving outside of court-annexed arbitration. Why this explosive growth, both outside and inside, and, of course, one obvious cause is the overburdened and under financed court system. That has long been true of the State courts, but only in recent years has it become true of the Federal courts, the Federal trial courts, including the courts of appeal.

One of the great problems, of course, and I have been talking about this around the country but like a voice, I think, in the wilderness, the problem in our Federal courts has been greatly impacted by the federalization of the criminal law by the President and the Congress, and most of this devastation of, I believe, the Federal trial courts has occurred in the last 6 years.

But with the bad news, there is also some good news. That is, for example, much of corporate America, and I think a fair amount of what I would call main street America, smaller companies, individuals, have decided that if you do not need a precedent in resolving disputes, and sometimes you do, sometimes you want to have a patent declared valid not only by the Patent Office but by the U.S. district court, so if you need that, you ought to try the case, but if you don't do that, I think a lot of companies have made up their mind it is better to resolve their disputes by ADR than in long protracted litigation, and I think many lawyers are reaching that same conclusion, some perhaps are only following their client, but most, I think, because they have seen the light.

My written testimony describes the benefits that have occurred from court-annexed, and I am not going to go through that, the Federal Judicial Center has done that very well.

I do want to say just a word further, though, about one of the storm clouds that I see developing on court-annexed. As we all know, if you leave the cases that are filed alone, just leave them alone, eventually—and I say eventually—90 to 95 percent of them will settle, but what is the damage in that long interval?

Great attorney fees, great disruption of the people on the business side, of the companies involved, and it often freezes the business plan, whether it is a small concern or a large concern, litigation tends to freeze that, and consequently, my point is, if court-annexed ADR is to be of any benefit, it has to happen very early after the case is filed, because if you just leave them go, they will

work themselves out, if you want to incur all of the expense, and so forth.

The statistics show that is not always happening, and a Professor Kim Dayton from the University of Kansas Law School had written an article in 1991 in the Iowa Law Review—now that is a little outdated, but I think we all ought to appreciate it, it is a little outdated, but her whole thesis was that we are getting to this too late in the court-annexed ADR, and that we are not improving significantly on what would happen without it.

As I say, that is quite dated information, and a lot has happened in the last 3 years. Of course, what she suggests to solve this problem is to move up what we now call discovery, and I think we will eventually call it disclosure, move it up earlier so that people know what they have and can go into an early neutral evaluation, or go into mediation, or even nonbinding arbitration, and have a pretty good concept of their case. I think that is what we are going to have to do.

We have this in the Northern District of California. We have General Order No. 34. We have had it for a year, and it is essentially a disclosure order. The plaintiff comes in, in the old days, you came in and said, here is my complaint, now try and find out whether I am right or not. Now you come in and you file your complaint and say, and here is my evidence, and the other party is supposed to come in and answer, and say, here is my defense, and here is my evidence.

That is a great difference between disclosure and discovery, and I think that this is going to become more and more the question. It is going to be a question, of course, Mr. Chair and members of the committee, for your subcommittee, because now the Supreme Court has forwarded the Judicial Conference's proposals or changes in the Federal rules, and I understand that is now down here before you, and I understand it is going to be before your subcommittee.

One of the matters that is very much involved in that, of course, is rule 26, which does provide for a type of disclosure rather than discovery. It is very much like our General Order No. 34 in the Northern District of California.

That is not going to be easy. When I left San Francisco yesterday, our legal paper, and I think you probably had the same article in the legal paper here, it says, "Civil Defense Bar ready to march on Capitol Hill, plaintiffs may join the fight against the new discovery rule."

Mr. HUGHES. Well, they will have to get in line.

Mr. RAVEN. So they are coming along.

I think that eventually this fight is going to be won in this country, and it is going to be a disclosure, because we can't afford the arduous discovery we have gone with in the past. The reason cases have cost so much to litigate, especially in the Federal courts in the past is the tremendous effort that went into discovery. Depositions by the scores, interrogatories, requests for admissions, hundreds of thousands of dollars.

A lot of people are going to say, if you just have disclosure isn't the honest lawyers and honest client going to suffer and the one

that wants to cover up and won't produce the documents, won't give you an honest disclosure, aren't they going to prevail?

Well, the answer to that is, I think you are going to have to also change the Federal rules and have some draconian measures for the cheating client and the cheating lawyers and, if you find a lawyer has knowingly not produced the document that clearly should have been produced, I would say 1 year's suspension, and the second time disbarment.

I think we are going to have to do something like that because, otherwise, we are going to burden the litigation process so much in this country, that what is happening is going to happen until we don't have room in the courts for the civil cases. We don't have room now.

I had a big patent case last year in Los Angeles. We had 14 patents, 7 on each side. Finally, the trial judge told us, and of course he was pushing us a little on settlement, but he said, you can bring your jury over here, Bob, every Friday. I said, you must be kidding, every Friday, we will be here for 3 years. We have 14 patents.

He was putting a little pressure on it, but he was kind of serious, too, because he has to try criminal cases during the rest of the week.

So I think we are moving down the right road. I think this bill is moving down the right road, and we very much support it.

[The prepared statement of Mr. Raven follows:]

PREPARED STATEMENT OF ROBERT D. RAVEN, CHAIRMAN, STANDING COMMITTEE ON DISPUTE RESOLUTION, AMERICAN BAR ASSOCIATION

INTRODUCTION

Mr. Chair, Members of the Subcommittee: I am Robert D. Raven, Chair of the Standing Committee on Dispute Resolution of the American Bar Association (ABA). I have served as Chair of the ABA's Standing Committee on the Federal Judiciary, the Standing Committee on Legal Aid and Indigent Defendants, and as Chair of the Committee on the Trial of Antitrust Cases of the Section of Litigation. I have served as President of the Bar Association of San Francisco, the State Bar of California and of the American Bar Association.

I am here today on behalf of The ABA and its Standing Committee on Dispute Resolution which, as of February 8, 1993 became the Section of Dispute Resolution. The ABA understands and supports the underlying public policy issues HR 1102 is to address, to wit:

> To improve the administration of justice in our federal district courts, and to reduce civil case delay and expense through the increased utilization of dispute resolution techniques.

The ABA also shares the belief that the system can and should be improved. There is no shortage of proposals directed at improving the system. As ABA President J. Michael McWilliams has said in his program "Justice for All," the public wants improvements in the civil justice system to guarantee that justice is delivered more quickly and at less cost.

Towards this end, ABA President-elect R. William Ide, III, has established a Civil Justice Improvement Planning Group. This group will examine issues and develop implementation proposals that will ensure more economical and expedient justice.

The ABA recognizes the importance of the development of appropriate uses of dispute resolution in resolving legal disputes quickly. Present ABA policy supports the:

> continued use of and experimentation with dispute resolution techniques both before and after suit is filed so long as they assure that all parties' constitutional and other legal rights and remedies are protected.

Use of dispute resolution is consistent with Rule 1 of the Federal Rules of Civil Procedure, i.e., "[t]hese rules... shall be construed to secure the just, speedy, and inexpensive determination of every action." With more federal court time and resources being devoted to criminal cases, this has become more difficult.

I. The State of the Federal Courts

During the 12-month period ending June 30, 1992, in 37 of 94 U.S. district courts, more than half of the trials were criminal. The U.S. District Court of the Southern District of California led the way with 86 percent of trial time devoted to criminal cases.

During this same period, 48,242 criminal cases were filed in U.S. district courts—a six percent increase over the previous year. More than 25 percent of these criminal cases were drug cases, resulting (according to a Rand Institute study) in over 65,000 years of prison time. In compliance with The Federal Speedy Trial Act, this large volume of federal criminal cases take precedence over civil cases.

I have often spoken and written about how the federalization of criminal laws increases the workload of federal trial courts. My concern is that some federal courts will become so overwhelmed by criminal cases, they will be virtually unable to try civil cases. Judith Keep, Chief Judge of the San Diego Federal Court, commented that her court "is sinking in the mire of criminal cases," which has turned that court into a "police court."

Faced with these challenges, I believe that alternative dispute resolution will play an increasingly important role in our federal courts.

II. The Growth of ADR

In many disputes, dispute resolution techniques have several advantages over litigation. In addition to relieving court congestion, dispute resolution often saves time with reduced stress and expense. For those reasons, the use of dispute resolution has skyrocketed in the last eight years.

Let me offer a couple of indicators of what is happening:

American Arbitration Association is the principal provider of arbitration services in the country. Although there are no figures on all the disputes resolved through consensual arbitration, last year the AAA reported 61,858 cases were resolved, an increase of nearly 100% from 1982. (This figure is particularly significant when compared to the average of 22 civil trials handled annually by a federal judge.)

The Center for Public Resources is an important provider of dispute resolution literature and training materials whose primary focus is corporate America. The CPR corporate and law office pledge has been adopted by most of the leading corporations and law firms in the country.

In essence, the corporate pledge provides that a CPR corporate member who signs the pledge will not sue another corporate member who has signed the pledge without first attempting to resolve the matter before proceeding to court.

Six hundred of the nation's largest companies and their subsidiaries, which account over one-half of the gross national product, have signed the corporate pledge.

Similarly, 1,425 law firms have signed the law firm pledge, including 400 of the 500 largest law firms.

Finally, the recent conversion of the ABA Standing Committee On Dispute Resolution to the Section of Dispute Resolution, shows the growth and acceptance of dispute resolution within the legal profession. To convince the ABA House of Delegates to approve the creation of the Section of Dispute Resolution more than 5000 people submitted declarations of intent to join.

Part of what has fueled this growth is the acceptance by the United States Supreme Court of arbitration clauses in recent years. For example, in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth,* 473 U.S. 614 (1985), the Supreme Court ordered enforcement of an arbitration agreement to resolve all statutory antitrust claims, including treble damages, by arbitration in Japan of a dispute involving a Japanese car manufacturer and a dealer in Puerto Rico.

Another case, *Shearson/American Express. Inc.* v. *McMahon,* 482 U.S. 220 (1987), enforced an arbitration agreement which included investor fraud claims under the 1934 Securities and Exchange Act.

As I indicated, part of the increase in the use of dispute resolution techniques is due to the delay in our courts. I believe, however, that the growth of ADR is more than just a frustration with our court system: Increasingly, the public and private sector are realizing that ADR offers distinct advantages for disputants who are not seeking to establish a precedent (such as a patent), but wish to resolve their dispute in a timely and cost-effective manner.

Entire industries are turning to arbitration and private judges as a means of resolving their disputes: the securities industry, medical malpractice, and "lemon laws" in the automobile industry now choose alternative dispute resolution procedures in consumer contracts. Recently the Center for Public Resources announced

an ADR program that would handle disputes between franchisor and franchisees—members include McDonald's, Kentucky Fried Chicken, Holiday Inn, and Jiffy-Lube.

There is also increased usage of dispute resolution, such as arbitration and mediation, in disputes arising from real estate transactions, construction contracts and environmental issues. At some construction sites, a mediator or arbitrator is permanently located on the site. The picture is clear: ADR techniques play a central role in the resolution of civil disputes in this country.

III. Court-Annexed Arbitration

With this as our backdrop, let's look at the performance of court-annexed arbitration in the federal courts including some of the problems these programs have experienced. I will conclude with some brief remarks about the implementation of the dispute resolution provisions in the Civil Justice Reform Act of 1990, 28 U.S.C. Sec. 476(a)(6).

A. History

In 1976, in St. Paul, Minnesota, the ABA co-sponsored the National Conference on the Cause of Popular Dissatisfaction with the Administration of Justice (The Pound Conference). This conference marked the beginning of the current interest in court-sponsored dispute resolution programs to reduce cost and delay in civil litigation.

In 1978, three federal district courts: the Eastern District of Pennsylvania, the Northern District of California, and the District of Connecticut, began experimental court-annexed arbitration programs.

In 1985, the Administrative Office of the U.S. Courts selected eight new pilot districts to join two remaining 1978 programs. These were: Middle Florida, Western Michigan, Western Missouri, New Jersey, Western Oklahoma, Eastern New York, Middle North Carolina, and Western Texas. The Judicial Improvements and Access to Justice Act of 1988, P.L. 100–702, inter alia, provided statutory authority to continue the ten previously piloted compulsory arbitration programs by the Judicial Conference and permitted the Judicial Conference to select ten additional courts to pilot voluntary, non-binding arbitration programs. The Act authorizing these programs expires on November 19,1993, save passage of HR 1102 which authorizes their continuation and expansion—which the ABA supports.

B. The Federal Judicial Center Report

In 1990, the Federal Judicial Center released its evaluation of the ten programs. Its major findings were as follows:

Arbitration programs provided more timely case resolutions, two to eighteen months sooner than cases resolved by trial;

Most parties and attorneys did not view arbitration as a form of second-class justice;

Large majorities of clients and attorneys believed the arbitration program procedures and hearings were fair;

Arbitration programs reduce the overall cost of litigation by reducing costs in cases referred to arbitration when they close before or as a result of the hearing;

Judges overwhelmingly believed that arbitration programs reduced their caseload burden although there was no good data available on whether the number of trials was reduced and;

Ninety-seven percent of the judges surveyed supported the expansion of court-annexed arbitration to other courts.

The ABA has not conducted its own study of the court-annexed arbitration programs; however, we highly regard the findings made by the Federal Judicial Center. Those findings have fueled, in part, our support for HR 1102, the Court Arbitration Authorization Act of 1993, which authorizes further development and implementation of these programs throughout the federal court system.

C. Storm Clouds over Court-Annexed Arbitration

Let me add a word of caution about court-annexed arbitration. I see, at least, one storm cloud ahead of us. We are all aware of the statistics that about 90% to 95% of all lawsuits filed each year in the United States ultimately settle. The bad news is that these settlements occur after large attorneys fees, great loss of executive time and disruption of business. Moreover, often pending litigation inhibits business action that, but for the litigation would be taken. In other words, litigation tends to freeze planned corporate action. Consequently, it is clear that for "value added" case disposition, court-annexed arbitration must occur early in the process. In short, time is of the essence in court-annexed dispute resolution.

Some of the data that we have seen regarding court-annexed arbitration is discouraging. Statistics show that court cases being settled by court-annexed dispute resolution procedures often occur months after the case is filed. These statistics further indicate that many of the cases disposed of by dispute resolution procedures might have settled just as early, without dispute resolution intervention.

This problem has been examined by Professor Kim Dayton of the University of Kansas Law School in a provocative article in 76 Iowa L. Rev. 889 [1991] entitled "The Myth of Alternative Dispute Resolution in the Federal Court."

Professor Dayton comments:

> The United States District Court of Connecticut, one of the original three pilot court-annexed arbitration districts, abandoned its program due to disproportionately high administrative costs associated with arbitration as compared with traditional case management techniques. Its study, conducted over a three-year period from April 1978 to February 1981, estimated that 14% of the district's administrative resources were devoted to handling arbitration cases, which represented only 7.2% of its civil caseload.

Professor Dayton continues:

> A recent report of court-annexed arbitration in the Middle District of North Carolina concluded that there were few differences with respect to such variables as length of time from filing to disposition or administrative costs between cases assigned to the dispute resolution track and those handled according to the court's traditional methods.

She further notes:

> The Federal Judicial Center's report on the ten mandatory court-annexed arbitration programs shows that in only three of the ten districts has the time from filing to disposition been reduced.

Professor Dayton claims that:

> A Rand Corporation study of court-annexed arbitration shows that although arbitration resulted in nominal savings to litigants, more cases settled prior to trial than prior to arbitration. The length of time required for disposition was virtually identical and the courts cost to administer the program was the same.

Professor Dayton concedes, however, that "most surveys show that lawyers and clients believe that dispute resolution is successful in reducing costs and delay, as well as promoting settlement."

Professor Dayton identifies one of the principal challenges facing the use of court-annexed arbitration: how to reduce the time involved in resolving a dispute.

Of course, the problem is best averted if the dispute resolution procedure can be used before a complaint is filed. That is the purpose of the CPR corporate pledge. But, if the dispute has worked its way into the court process, we are then faced with the problems that I have outlined.

To solve this problem, court-annexed dispute resolution must be scheduled early in the process before parties have engaged in extensive discovery.

IV. Confronting the Problems of Court Annexed Arbitration

In the April 19, 1993, issue of *The Legal Times,* Paul L. Friedman, Chair of the Civil Justice Reform Act Advisory Group of the U.S. District Court for the District of Columbia, authored an instructive article titled, "*Speeding Up Justice At The District Court.*" Based upon two years of research, prior to drafting its plan, the advisory group confirmed four principal causes of delay in civil cases:

Setting of unrealistic trial dates in civil cases which are frequently "bumped" by criminal cases that must be tried promptly under the Speedy Trial Act;

Failure of judges to rule promptly on motions or unresolved discovery disputes;

Lawyer requests for additional time for discovery or to file responsive pleadings; and

Improper and abusive discovery practices.

As principal factors relating to excessive cost in civil litigation, the group found three contributing factors:

Abusive or improper discovery practices;

Resolution of discovery disputes; and

Judicial insistence that parties meet deadlines that are not carefully tied to realistic trial dates.

I believe the above finding on causes for delay and excessive cost in civil litigation would be found similarly in most, if not all, of the 94 U.S. district courts. If so, then we must ensure that court-annexed dispute resolution procedures are used early after a case is filed before costly discovery gets underway.

Magistrate Judge Wayne Brazil, of the Northern District of California, commented on the susceptibility of the Federal Rules of discovery to abuse by parties:

> Instead of reducing the sway of adversary forces in litigation and confining them to the trial stage, discovery has greatly expanded the arenas in which those forces can operate. Rather than discouraging "the sporting game theory of justice, discovery has expanded the scope and complexity of the sport."

I submit that discovery, as we know it, will have to be dropped in favor of voluntary disclosure at the outset of the case.

You may be familiar with the Northern District of California's General Order 34. Section VII details the scope of disclosure and supplementation that is required of parties within 90 days of the filing of the complaint. The Northern District has been at the forefront of civil dispute reform and I have every reason to believe that General Order 34 will become the standard for other district courts to follow. Recently, the Supreme Court approved changes to the Federal Rules of Civil Procedure which will amend the pre-trial discovery process. For example, Rule 26 will pick up much of the disclosure concept that is in General Order No. 34. The proposals are now before Congress and it has 90 days to act. The Judicial Conference is hoping to have the new rules issued and dated as of December 1, 1993. These amendments will significantly change pre-trial discovery if the entire proposal is approved.

I believe these amendments will also enhance the effectiveness of court-annexed dispute resolution procedures by providing parties with an opportunity early in the process to evaluate and test the strength of their respective claims.

V. The Civil Justice Reform Act

Much of the reform in the federal district courts and the implementation of court-annexed dispute resolution procedures is currently being driven by the Civil Justice Reform Act of 1990, which directed all 94 district courts and federal circuits to implement a civil justice expense and delay reduction plan by December 31, 1993. I understand that over forty district courts committees have proposed plans. These 40 plus district courts, referred to as Early Implementation Districts (EID), consist of ten pilot courts—designated as EIDs by statute; four demonstration courts; and over 20 courts which elected to become EID's.

Among the four demonstration courts which were statutorily designed to experiment with dispute resolution techniques in reducing cost and delay was my own district, the Northern District of California. Originally, it was one of the three districts with non-binding arbitration. Under 28 U.S.C. Sec. 473(a)(6), the cost and delay plans of the pilot courts must provide "authorization to refer case to dispute resolution programs that":

> have been designated for use in a district court or
> the court may make available, including mediation, minitrial, and summary jury trial.

All other courts are to consider and may include in their plans authorization to refer cases to dispute resolution.

Of the 40 plus district court plans proposed, 32 use a dispute resolution referral system, and 12 establish an early neutral evaluation program. As these new programs are implemented, the district courts must be conscious of the "storm clouds" which limit the effectiveness and utility of dispute resolution procedures. Court-annexed ADR procedures must be scheduled early in the process before the costly and frequently contentious battles of discovery have been waged.

CONCLUSION

Finally, a few words about dispute avoidance. One of my great disappointments after practicing law for forty years is the small amount of progress made by lawyers and clients toward meaningful dispute avoidance. Yes, there are a few more compliance programs and a recent increase in corporate policy statements.

But for a nation that prides itself on "being a nation of laws, not men", we have made little progress in "establishing justice" as we were told to do by the founders of the Constitution.

Although there is a great outcry about the waste, and harm to the competiveness of the United States, from the burden of litigation, I have never heard any of the

complainants suggest that we should educate our citizens about the law and the need for compliance so that there would be less litigation.

I stand ready to respond to your questions.

Mr. HUGHES. I trust you settled this patent case?

Mr. RAVEN. We settled it, and in the settlement agreement, we put in ADR provisions.

Mr. HUGHES. Was that on one of the Fridays?

Mr. RAVEN. Pardon?

Mr. HUGHES. You settled it one of the Fridays?

Mr. RAVEN. No, we didn't. It took longer than that. In fact, we had it settled once, and they welshed on us. Instead of going in and trying to enforce it, we went back to the negotiating table and worked it out again.

Mr. HUGHES. Thank you very much for your testimony.

Mr. Sturtz, welcome.

STATEMENT OF RONALD M. STURTZ, CHAIR, ARBITRATION COMMITTEE, SECTION ON LITIGATION, AMERICAN BAR ASSOCIATION

Mr. STURTZ. Good morning, Mr. Chairman, and members of the committee.

I appreciate very much the opportunity of being here, being invited by the committee to bring the views of the Litigation Section of the American Bar Association to this proceeding. I am particularly appreciative of being here with the distinguished panelists who have been before us, the witnesses, including Mr. Raven, of course, who is a true leader in ADR, and it was his gracious request that the litigation section, with 62,000 members, the largest section, presents its views, because, after all, this is all about litigation.

Now, that is the rub because litigation is really settlement in the first instance, and perhaps that is what is most important about mandatory but nonbinding ADR and arbitration.

Chief Justice Warren Burger, and I put this in my extended remarks, said it in 1986, and I think, if we all left here with just this in mind, probably H.R. 1102 would become law, because he said, "The true function of our profession should be to gain an acceptable result in the shortest possible time with the least amount of stress and at the lowest possible cost to the client to accomplish that is the true role of the advocate."

I think that the record you have heard Judge Schwarzer testify to, that Judge Simandle who has operated with it on the local scene in New Jersey for 8 years has told you, and of course Judge Williams as well, and certainly Mr. Raven, that you get to the point of decision significantly earlier in the game by mandatory but nonbinding arbitration.

In my materials, I indicated that when advised of the opportunity to be here, I thought it appropriate to try to make a fast survey of the scene as of the latest possible time because, as you know, the report prepared by the Federal Judicial Center is dated 1990, albeit from substantial experience before that.

I communicated by fax, the modern medium, with all of the chief judges in the 10 districts, and also a number of members of the litigation section who are the so-called leaders of the profession to ask

for their views of how the court-annexed arbitration program has worked. They are almost unanimous in supporting the concept of arbitration as it is conducted under most of the rules in the 10 districts, and particularly the adoption of H.R. 1102, because they believe it facilitates getting to that place in the life of a dispute consistent with what Chief Justice Burger said, the earliest possible time, least cost, and lowest amount of stress.

Judge Henderson, a Chief Judge from California, wrote a very thoughtful letter to me, and he asked, if I did nothing else, that I stress perhaps the important concept that it really isn't mandatory arbitration at all, it is presumptively mandatory arbitration. He, in turn, quotes Magistrate Judge Wayne Brazil, how is also from California, and now recently deceased Judge Peckham, who is perhaps the giant among us all in this area, with whom I have spoken many times, and I am sure Mr. Raven has, too, and it was he who has said if we emphasize the concept that it is always within the control of the parties to resolve their dispute. the idea is, how do you get to that point earlier.

Now, most people are reluctant to introduce the subject of settlement. It is just a plain fact. I have been litigating for 35 years. Every time I meet a client, the question is asked, is there some way of settling this case, but we are not going to let the adversary know that we are interested in settlement, of course, because inevitably the price goes down or it goes up, depending upon which side you are on.

So the technique is, how do you get to the point, when is the right time?

Well, the mandatory but nonbinding arbitration solves that problem because it positions the court as the leader in saying, come in, you are going to be given the opportunity to present your case to a fair, impartial, experienced lawyer. You couldn't buy that service for the price that most of these arbitrators receive; who vie for the job, I am told, and that is very interesting, to earn $250. I bill $300 an hour, and so 1 hour of my time is $50 less than what I would get if I were an arbitrator, and yet these arbitrators will spend a day on the matter. One of my partners, who bills significantly more than that, spent 2 days as court-appointed arbitrator on a court-annexed arbitration in New Jersey, because he felt that was what he owed the matter. I think, at that point, he was receiving even less than the $250 per case fee.

The idea that it is second-class justice just doesn't wash when you understand what you are getting is an outsider's impartial view, given the opportunity to present your case, and to hear the other side's in the presence of the parties as to what the dispute is all about. Now what do you do?

Judge Henderson, again, made the point, you get to the point of decision, the place in the litigation when the parties are given the chance, one way or the other, accept the settlement if you are the plaintiff, or reject it, perhaps, if you are the defendant, or vice versa, and you get to it sooner than you could ever get to it if it sits on the docket and gets to the normal point at a time when Judge Simandle or Judge Williams or Judge Schwarzer, when he was sitting in California, could get to it because of the plethora of cases.

The idea that you should perhaps mandate court-annexed arbitration sooner, and that perhaps there is too much discovery, I suggest, is answered, at least under the New Jersey system the way it is conducted. Judge Simandle could probably speak better to this, having done it for all of those years as a magistrate judge, and now a district court judge.

The magistrate will pretty much set the parameters of discovery before the arbitration gets into full swing, and if there is a need for a little bit more, you get a little bit more, and if somebody says, Judge, why do we have to take 10 depositions before this arbitration, bearing in mind that in traditional arbitration you may not get any discovery, then that is a reasoned decision, and nothing that would impede the result.

One other thing, the idea that it is a layer of further effort on the part of litigating lawyers and the parties, which is somehow going to preclude the parties from getting to the ultimate trial, should you choose that in these modest cases. I don't mean to demean $100,000; if it was my $100,000, you can believe it is a lot of money, and so I respect that sum, although I believe that it could be higher, as I said, and so do other lawyers seem to think that.

But if you get to that point, the chances of court-annexed arbitration being an extra expense are de minimis. Any good lawyer is going to do exactly what he did in the dry run of the arbitration, and he is not going to have the benefit of an independent person for $250, in our district, to sit there and pontificate with some degree of binding authority on the result. It is the kind of independent view of the case which you would hope for, and you just can't get, because most lawyers don't take the time to get involved in somebody else's case. Yet, here, by the procedure, they would be.

It is also interesting to note that in Oklahoma, where I received a response of the chief judge who indicated that the parties are looking for the opportunity to get into the arbitration program because they know it is a methodology to get into the settlement mode.

I would give you one answer to a previously posed question to a witness. I think discovery is easily handled by the scheduling of a magistrate judge as to how much discovery you get before an arbitration. In New Jersey, we adopted in 1987 an ADR Act. I happened to write it, but I didn't pass it, you can be assured. Congressman Florio introduced it in Congress, but then he obtained another job before we could do anything with it here. The point was that you have a form of arbitration. It can be binding. It is all voluntary in this instance, of course, but the interesting thing about it is that it provides explicitly for minimal discovery, very minimal, conditioned upon the kind of issues that are involved. This could easily be done by local rule, if it needed to be any more formalized than a magistrate handling it at the beginning of a case.

I think if we understand that there must be liberal opt-out provisions so that, if a litigant thought that she or he only had a certain amount of money to devote to a case mandated into the program, and if that person only had, let's say, $1,000 to litigate the case, and the lawyer is reticent to spend the $1,000 on a procedure which, at the end of the exercise may be futile in that sense of the

word, you didn't get to the settlement, not statistically correct, but if that were the case, I suspect that that is not an accurate representation of what really goes on in the practice of law.

Lawyers do not take cases and file them in the U.S. district court without preparing them. This court-annexed arbitration is nothing more than a very sophisticated way of preparing cases, and getting to the point of resolution that much sooner, and I think that much more efficiently.

I will give you only one other thought. I received just yesterday before I came here a paper from California titled, "The Recorder." I don't know how well it is circulated, but it says, "'Silver Foxes:' Tradition as an Alternative." What it says is that silver foxes are wily senior practitioners who profit by cutting quickly to the bottom line of disputes. They keep business coming back by emphasizing resolution over process, and by churning out results rather than billable hours.

I suggest that the court-annexed arbitration statute gets you to that point, it gives us one of the tools of the silver foxes.

Thirty-five years ago, I was asked by an uncle of mine, what grade did I get in the course on settlement, 35 years ago, and, of course, I laughed. There were no courses in settlement 35 years ago.

Today, if I asked that question of any lawyer getting out of law school, the lawyer would say, well, I have had one in arbitration, I have had one mediation, I have had one in—and you name it, and they are given at every law school as part of the curriculum, there are courses. You have heard about the Harvard Conference that is being prepared now. There was one in 1991, I think, and the litigation section, 62,000 lawyers who litigate, go to court and want to try cases, are part of the process working with Judge Schwarzer and the Federal Judicial Center and the Center for Public Resources. There has to be a reason. Clients want ADR, and that is why H.R. 1102 should be adopted.

[The prepared statement of Mr. Sturtz follows:]

PREPARED STATEMENT OF RONALD M. STURTZ, CHAIR, ARBITRATION COMMITTEE, SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION

My name is Ronald M. Sturtz. I am a member of the bar of the State of New Jersey having been admitted in 1957. I am a member of the law firm Hannock Weisman, a professional corporation, with offices in Roseland and Trenton, New Jersey. I appear today on behalf of the Section of Litigation of the American Bar Association. I presently serve as chair of the Arbitration Committee and have previously been vice-chair of the Alternative Dispute Resolution Committee. I am also a member of the New Jersey Supreme Court Dispute Resolution Committee, and part of the team that authored the Supreme Court of New Jersey Complementary Dispute Resolution Rules. In 1992, that effort was recognized by the Center for Public Resources with its award for outstanding achievement in dispute resolution.

The Litigation Section, with 62,000 members, is the largest section of the American Bar Association. The ABA has 351,000 total membership. As the name of the section implies, our focus and mission is to provide leadership, training and exchange of information to attorneys who specialize in representation of clients where those disputes have ripened into litigation, or is about to get there, sooner than later. Our fundamental goal is to serve our clients in the best way possible. As officers of the court, we also have a duty to make the justice system work efficiently and fairly.

This statement, and my appearance before the House Subcommittee on Intellectual Property and Judicial Administration, is in response to the invitation of the Honorable William J. Hughes, Chairman. The Section of Litigation is grateful for

the opportunity to present its views on the adoption of the Court-Annexed Arbitration Authorization Act of 1993, H.R. 1102. We support the adoption of this bill.

I. VANTAGE POINT OF THE BAR AS TO COURT-ANNEXED ARBITRATION

The report published by the Federal Judicial Center in 1990, B. Meierhofer "*Court-Annexed Arbitration in Ten District Courts*" (hereinafter "Report") was required by the enabling legislation, 28 U.S.C. §§651-658. It thoroughly sets forth each of the significant issues which must be considered in evaluating the success or at least acceptance of the original enabling statute as well as enactment of H.R. 1102. While the Report has been provided to this Committee, certain parts of it will be referred to in this statement since it succinctly makes the point and provides relevant information.

The "goals" of mandatory but non binding court-annexed arbitration (hereinafter sometimes "CAA") are straightforward and stated to be:

> Increasing options for case resolution by providing litigants in cases that normally settle with an opportunity to accept a known adjudication by a neutral third party given at an earlier time than is possible for a trial;
> providing litigants with a fair process;
> reducing costs to clients;
> reducing the time from filing to disposition;
> lessening the burden on the court by reducing the number of cases that require judicial attention, or by reducing the amount of attention required. [Report, p. 1.]

Court-annexed arbitration is one of a number of court authored methods of alternative dispute resolution (ADR). It is used in both the state and federal court systems to assist litigants in resolving disputes short of full trial. The one characteristic of all such ADR methods is that the ultimate decision of whether to conclude the litigation rests with the client. The procedures may be different, but the end goal is to assist the parties in addressing the issues in a fair, less expensive and expeditious way.

From the attorney's point of view, having the best interests of the client always in mind, the earlier in the "life" of a dispute the parties can address their grievances, the more likely the matter can be consensually resolved, i.e. settled. Chief Justice Warren E. Burger discussed this issue in perspective at the 1986 annual meeting of the American Law Institute where he observed:

> The true function of our profession should be to gain an acceptable result in the shortest possible time with the least amount of stress and at the lowest possible cost to the client. To accomplish that is the true role of the advocate.

The American Bar Association, Commission on Professionalism Report to the House of Delegates (reported 112 F.R.D. 243) presented on August 12,1986, adopted as one of it's recommendations that the profession should be constantly alert to seek improvements in the system of justice, and that "[t]his should embrace such activities as supporting the expanded use of alternative methods of dispute resolution." It is from this perspective that the Section of Litigation supports the enactment of H.R. 1102. It has adopted this position considering how the program has worked, and the way that experienced trial lawyers, i.e., litigators, see typical disputes presented to them as advocates and counselors develop and then be concluded.

To understand why litigating lawyers believe that the mandatory CAA program has been accepted as a worthwhile ADR method, one should understand how the program works. The Report gives those essentials:

Program Characteristics

The arbitration programs developed in the ten federal pilot district courts have a number of features in common.

> Particular types of cases, as specified by local rule, are mandatorily referred to the program to be heard either by a single arbitrator or by a panel of three arbitrators (lawyers who have volunteered to serve and are paid at levels specified by each district).
> Following a hearing at which each side presents its case, arbitrators issue a decision based on the merits of the case and, where appropriate, determine an award.
> Parties who are dissatisfied with the decision at arbitration then have a specified period of time to file a demand for trial de novo.

If a demand is filed, the case goes back onto the regular docket for pretrial and trail before the judge assigned to the case.

If a trial de novo is not demanded, the arbitration award becomes a non-appealable judgment of the court. [Report, p. 3]

II. THE EXPERIENCE

I will not attempt to repeat the statistical information available to this Committee concerning cases in the 10 districts where the mandatory program is in force. When advised of the invitation to present the Litigation Section's views on H.R. 1102, I embarked upon an informal survey of the Chief Judges in each such district, and also a selected group of litigating attorneys who practice in those same districts, and are part of a group which comprise the leadership of this Section. At the time these remarks are being prepared, not all of the anticipated responses have been received. However, from those which have, it seems clear that there is very significant client and attorney acceptance and satisfaction with the court-annexed arbitration program. I believe that the mandatory, but non binding features of the program are what make it a success.

It is obvious to anyone who actively practices law, that except in special cases, usually the subject of settlement must be addressed. Historically, attorneys have been reluctant to initiate such discussions. It is perceived as indicating some form of weakness or lack of resolve to allow the matter to proceed to ultimate imposed disposition. We all know and expect that sooner or later, the subject will be thrust upon the parties by the court as part of a formal pretrial process, or by an informal suggestion during some phase of the litigation.

The CAA program, applicable to those federal cases where the amount in dispute is within prescribed and by most standards modest limits, creates the vehicle for imposed opportunity for the parties to face the settlement question sufficiently early in the litigation to afford significant savings. The key elements of client satisfaction appear to be the opportunity to present the matter to an impartial, qualified, experienced person, in most instances selected independently by the court, who will give her or his non binding views on the outcome of the litigation. That determination will become binding unless a party rejects the result. While it is true that the dissatisfied litigant must request a trial de novo for the arbitrator's award not to become final, the consequences are virtually inconsequential, essentially the costs of the arbitrator's fee, if the result to the party demanding the trial is not better than the result reached in the arbitration. While it is also true that counsel fees can be awarded in circumstances where the arbitration was had by consent if the trial de novo request was characterized by bad faith, (28 U.S.C §(e)(2)), that authority probably already exists under Federal Rule of Civil Procedure 11.

The more "serious" consequence of the imposition of court-annexed arbitration is the time and expense necessary for the litigant to participate in the arbitration. Since it can be reasonably presumed that every party would be prepared for the ultimate court proceeding if a trial de novo is demanded, the expense attributable to counsel's participation in court-annexed arbitration will not result in any significant additional burden. It is, after all nothing more than a disciplined "dry run" for the required main event. It usually leads to the first round of settlement discussions. By compelling the litigants to get to an early "point of decision", i.e., the time in the life of a case when it is concluded unless one party is dissatisfied and chooses to go to trial, the matter may, and from the statistics, usually is concluded.

However, when it is considered that even if the arbitration does not then conclude the case, it gives the parties and their counsel the early opportunity to see the adversary's case, evaluate their positions and consider an independent view of those positions. The risk of a trial de novo, and the mandated experience of the arbitration is worth the price, in the opinion of most of those exposed to the process. Chief Judge John F. Gerry of the United States District Court for the District of New Jersey in his April 28,1993 response to our request for experience reports an exceptional level of litigant and attorney satisfaction with the arbitration process. Approximately 9,000 cases have been placed into the program since its 1985 inception. Approximately 1% ended up having to be tried.

The Middle District of Florida reported only 3% of closed arbitration cases (i.e. cases required to enter the program) went to trial, versus 6% of closed non arbitration cases. Their April 29,1993 letter notes "[t]he resultant cost savings to arbitration case litigants is obvious. Equally important is the fact that saved bench time is devoted by the judges to the trial of other civil and criminal cases." Chief Judge Ralph G. Thompson of the Western District of Oklahoma in his April 26, 1993 letter advises that the arbitration program "has become an integral part of the litigation process in our court. Attorneys who practice here regularly plan for it and build it

into their litigation case management and often rely on being put into mandatory arbitration to speed up the settlement process."

Under all of these circumstances, being required to participate in court-annexed arbitration is not in any way "second class justice." Indeed, one could genuinely make the case for the proposition that being afforded the opportunity to have the attention of an experienced litigating lawyer as the court designated arbitrator at a very modest cost is actually an advantage. In a number of districts, court appointed arbitrators serve on a pro-bono basis, and in any event the modest fee is often less than the usual rate for equivalent time devoted to other matters. The Federal Judicial Center's Report makes the following observation:

> Regardless of specific procedures, litigants who go through any alternative process, even if they reject the result, have gained information—be it a determination on the merits, an appraisal of settlement value, or a creative settlement package—that was not available under traditional procedures. This new information should enable litigants to better predict the outcome of their cases and ensure that both sides are operating on the same information. This, in turn, may narrow the issues in controversy and spur further negotiation, thereby leading to more settlements or to shorter, more focused trials. [Report, p. 17.]

From the information received as a result of informal requests mentioned above, we understand number of attorneys in districts with court-annexed arbitration have recommended that cases having higher threshold limits of more than $100,000 be mandated into the program. Considering the limited class of cases authorized to be included in the program as now conducted and authorized by 28 U.S.C. 652 (a).

III. VOLUNTARY OR MANDATORY PROGRAMS AND AUTHORITY FOR ALL DISTRICTS TO ADOPT COURT-ANNEXED ARBITRATION PROGRAMS

We have already adverted to the generally accepted teaching concerning the inherent disinclination of most attorneys to initiate settlement discussions. This is so well understood that if this testimony was being offered in a United States District Court, this fact would be judicially noticed. However, because the concept is so important to our consideration of H.R.1102, brief reference to authoritative support is warranted. In its work *Court ADR: Elements of Program Design,* a publication of the CPR (Center for Public Resources) Legal Program, CPR Judicial Project, by Elizabeth Plapinger and Margaret Shaw, 1992, the authors at pp. 15-16, quoting very experienced and respectable sources note:

> Some observers question the usefulness of voluntary court ADR programs, however. U.S. Magistrate Judge Wayne D. Brazil of the Northern District of California points out that since few litigants actually "volunteer" into court ADR programs, "[v]olunteer programs are not likely to contribute significantly to cost and delay reduction." He thus favors presumptively mandatory programs with liberal opt-out provisions. U.S. District Judge for the Northern District of California Robert F. Peck ham agrees, noting that so long as the court can exclude appropriate cases from ADR and there are no penalties for its use, mandatory ADR seems to work much better, especially if lawyers themselves are reluctant to suggest ADR to adversaries for strategic reasons.

Chief Judge Thelton E. Henderson, United States District Court, Northern District of California in his April 28,1993 exceptionally well considered letter response to our request for updated input on his district's experience with CAA and views on H.R. 1102 told us that voluntary court-annexed arbitration "generally draws little or no participation." His explanation, to which I subscribe, is simple: "counsel are hesitant to take responsibility of advising a client to go forward with arbitration, when it is not court ordered." Judge Henderson also indicates in his letter that he would strongly recommend adoption of "presumptively mandatory programs in other districts."

Experience with mandatory programs discloses that they are not quite that at all since it appears that the parties can seek to be excused from proceeding upon appropriate application, which may be generally characterized as for "good cause." See *Court ADR,* above at pp 37-39. Judge Henderson has also urged the use of the term "Presumptively Mandatory Arbitration" to better describe what happens. This thought would portray such programs in a positive way. Further, by giving district courts the option of adopting court-annexed arbitration, it will introduce the concept of very meaningful ADR in a neutral setting. Since the present limits of such programs are generally set at $100,000, this modest level of case will serve to further

institutionalize the concept of ADR in the profession, and to the extent the general public becomes aware of such programs, build acceptance and confidence in that quarter too. *Mainstreaming* ADR is a very significant goal if the concept is to gain the acceptance it deserves.

The Civil Justice Reform Act of 1990 ("CJRA") requires each district to adopt and implement a Civil Justice Expense and Delay Reduction plan by December 31,1993. (Pub. L. 101-650, Sec. 471). An advisory opinion issued by the General Counsel of the Administrative Office of the United States District Courts has stated that "the CJRA should be read as not expanding arbitration beyond that already statutorily provided." At least three district courts have expressed interest in adopting a plan which would include mandatory court-annexed arbitration. *Court ADR,* above at pp. 10-11 n. 25. The advisory opinion, though without binding authority, has nevertheless placed an artificial impediment to the progress of ADR in the federal courts. H.R. 1102 would simply authorize (but not mandate) the adoption of court-annexed arbitration by appropriate action taken in each district, and thereby practically eliminate this implicit difficulty in going forward with a proven and familiar methodology.

IV. CONCLUSION

Based upon the evidence available to the Section of Litigation as best gleaned from its membership and research concerning the effectiveness of court-annexed arbitration, we support the adoption of H.R. 1102. The Report, *Court-Annexed Arbitration in Ten District Courts,* presented to this Committee further commends our support of this legislation. The Congress should not turn back the clock. By authorizing all federal courts to adopt, in their discretion, local rules for mandatory or voluntary arbitration, and further directing the Federal Judicial Center to monitor the federal courts' experience, the entire justice system will benefit, as will the litigants we all must serve.

Mr. HUGHES. Thank you very much, Mr. Sturtz for an excellent presentation. In fact, both of your statements were outstanding, very comprehensive, very thorough, and very helpful to us, and I appreciate that.

The "Silver Fox" article, where did that appear?

Mr. STURTZ. It is in a——

Mr. RAVEN. It is in the San Francisco Recorder, which is our daily legal paper in San Francisco.

Mr. HUGHES. Would you like to offer that for the record?

Mr. STURTZ. I would.

Mr. HUGHES. And also you allude to some letters that you have received from judges, would you like to offer those also?

Mr. STURTZ. I have four letters. I think I received six responses from the 10 chief judges of the various districts. Judge Gerry was particularly helpful in his response. I didn't want to repeat what Judge Simandle who was here and already told you about our district's views.

Mr. HUGHES. Who are the other judges?

Mr. STURTZ. We have from Judge Henderson also, that is in California, the Northern District. We received another thoughtful letter from Chief Judge Ralph G. Thompson of the Western District of Oklahoma, and we received one from the clerk in the Middle District of Florida, only because Chief Judge Moore, who asked that it be forwarded to me, was leaving for the Conference of Chief Judges as this letter was being sent. I received verbal responses from the Chief Judge in Pennsylvania, Bechtel, and I think I received another one from the Eastern District of New York, and I do not happen to have that letter with me.

Mr. HUGHES. The "Silver Fox" article, as well as the letters from Judge Gerry, Judge Henderson, Judge Thompson, and the one by

the clerk on behalf of Judge Moore will all be received in the record without objection.

[The information appears in the appendixes.]

Mr. HUGHES. Thank you very much.

Mr. Sturtz, you particularly highlighted a response by Chief Judge Henderson of the Northern District of California in which he said voluntary court-annexed arbitration generally draws little or no participation, and then goes on to state, counsel are hesitant to take responsibilities of advising a client to go forward with arbitration when it is not court ordered.

Does he share any insight into why that is the case?

Let me ask it another way, does that have anything to do with a belief that if it is initiated by one of the parties that is a sign of weakness in the case?

Mr. STURTZ. Absolutely. As part of my direct presentation, and also in response to one of the other questions about what the other forms of ADR, how well they are received, I think it might be useful for you to know that on November 23, I had the opportunity of being invited by the Chief Justice of New Jersey to speak to the entire New Jersey judiciary. They gather together every year.

The reason for it was, that it was important to institutionalize, and that is the word that is used, mainstreaming, they sound just like what they mean, the concepts of ADR, and that is all mandatory arbitration is, court-annexed, and the reason for it is that somebody has to take the lead to get the parties to the inevitable point, as you heard Mr. Raven say. Just let them alone, and sooner or later you would not see the case. Maybe you would see more of them on the trial docket than fewer, but you wouldn't see the case, by and large, for the most part.

So, following Justice Burger's idea, how do you get to it quicker, faster, and satisfactorily, and that is, you lead. Well, you lead by getting the people who can, in a neutral position, make the suggestion, and they inevitably do, whether it is formally or informally. Court-annexed arbitration is a formal way of saying, listen, you are going to go and try it out, it can't hurt you. You don't have to accept the settlement, and the ramifications of not accepting the award of the arbitrator are de minimis, the price at best of an arbitrator. I asked the question of some of the judges who called me before they wrote these letters, and I asked that question, do you think there is any reticence about the expense, and they said, "We don't believe so."

It was Pennsylvania, Chief Judge Bechtel said to me, "I don't know of any case where a party couldn't afford to pay the money, if they had simply asked, and we regularly think about it, they wouldn't be excused on a forma pauperis concept." I don't think it requires a lot of imagination to know you are not going to have a searching inquiry over it. Somebody might look down a little bit and say, "Are you kidding, you are here in a Federal court with a $100,000 case, and you don't think you can afford $150 or $250 more, when you know the hourly rates of most lawyers, whether they are beginning or more."

So I think that the reticence, and that is what Judge Henderson was talking about. This way, a lawyer doesn't take responsibility with the client later on being dissatisfied with the very settlement

that was accepted. Remember, it requires acceptance by both of the litigants.

Mr. HUGHES. That argues, obviously, for mandatory arbitration.

Mr. Raven, it really is, indeed, a pleasure to have you with us, and I want to congratulate you on your outstanding work over the years. You obviously have been light years ahead of most of us insofar as alternative dispute resolution, and I congratulate you on your initiatives, and particularly the corporations' and lawyers' pledge, that you have developed over the years.

Mr. RAVEN. I thank you. I sent my children through college on litigation, trials, and so forth, but I was always one who believed that if you walk into a courtroom and see a trial going on, you know there is at least one fool in there, sometimes two, and often three.

Mr. HUGHES. You and I have something in common, because I, too, have sent children through college on ocean dumping as an issue.

Mr. RAVEN. We have a lot in common.

Mr. HUGHES. I seem to have spent my career here on that issue in particular.

Let me ask you a question, do you want to say something first?

Mr. RAVEN. I would like to make a point on this point that Mr. Sturtz made very well, I would like to add something to it.

We have, as you know, in our district out there, in the Northern District, we have this early neutral evaluation, and a couple of years ago, every fifth case was drawn out and got sent out there, now it is every other case.

I was representing the film companies in a very important copyright case on whether people could just take their films and show them inside of a hotel and not have to pay, and we drew the straw, so we were to go out to early neutral evaluation. At first, counsel on both sides was inclined to write a nice letter and say, "No, we need a precedent in this case, so it would be a waste of time."

We didn't want to offend anyone, and so we went out anyhow and, of course, we took our clients, which is required under our rule. Our clients met each other for the first time. Later on, I won that on summary judgment, and I was only handling the liability phase, so I was out of the case, and someone else came in to handle the damage, and they told me later that because the clients had met for the first time in that early neutral evaluation meeting, they got to know each other, they were able to sit down and they settled the damage part of it once the liability was—and there didn't have to be any long trial on damages.

Getting people together and, as Mr. Sturtz said, you know, there is sometimes a reluctance to make the first move and, of course, when a client first comes in, you don't want to be talking settlement because they are mad at that time, and that is not the time.

Mr. HUGHES. I think that is true. Although, it has been years since I practiced, it has been my experience, and I have a number of lawyers in our immediate family that share their experiences with me, that you need some mechanism to force lawyers to focus in on a case, and large firms in particular. The policymakers are sending younger lawyers out to do discovery. They are not in a po-

sition, basically, to bring that kind of focus that arbitration or other alternative dispute resolutions do in bringing it together.

It also seems to me that the more discovery is ordered, expenses build up. It appears there are those who practice by the poundage of interrogatories that they serve. This makes it more difficult in certain cases to settle. This is particularly true if parties are brought together at the end of that discovery process. You are looking at, sometimes, a pretty good size chunk of change for the discovery process.

Has that been your experience also?

Mr. RAVEN. Very much so. I think what has happened is that we are not trial lawyers any longer, we are litigators. The litigators mainly deal with discovery, when you get right down to it. The cases aren't tried like they used to be tried, and eventually, as the figures say, 90 to 95 percent of them are going to be settled anyhow, so why not get at it sooner.

That is why I am a fan, although I think a lot of the bar will be opposed, and I think you will hear them down here testifying, of this new disclosure concept that we have in General Order No. 34 in the Northern District, and which is included in the recommendation of the Judicial Conference which has come out of the Congress through you people.

There are going to be good arguments against it. The good argument against it is, you have to rely too much on the good faith of counsel and parties to produce, to disclose evidence.

Mr. HUGHES. That is why the sanctions that you suggested earlier can be very important.

Mr. RAVEN. Yes, it has to have tough sanctions.

Mr. HUGHES. Let me ask you, is there a need to increase the disincentives for requests for a trial de novo under the court-annexed arbitration process, or is it satisfactory as presently structured?

Mr. RAVEN. I think it is all right. I think it is a good wrinkle, as I understand it. I was concerned when that first started happening, and I thought plaintiff lawyers probably wouldn't like it, but the statistics seem to show they do. They get an evaluation of the case themselves, and if it isn't that good a case, they have a whole cupboard full of other ones, and they are willing to take that. So you have these high percentages, like 70 or 80 percent of acceptance in a lot of the districts.

Mr. HUGHES. Mr. Sturtz, you feel fairly strongly, apparently, that basically the incentive has to come from the judge. Basically, you want the judge to say, I expect you to sit down with the parties and arbitrate, whether you call it mandatory, or whatever you do. That addresses the concern over being perceived as being weak by asking for that, and, second of all, it is helpful relative to a settlement of the case because the process was prompted by a judge and has that official aura about it.

Am I correct in my understanding of the points that you make in that regard?

Mr. STURTZ. It is true not only with respect to court-annexed arbitration, but the question was asked earlier what about the other forms of ADR, and I think that the experience in New Jersey with the mediation program under the early implementation of the Civil Justice Reform Act bears that out as well.

We have now expanded mediation beyond its original purview. I happen to be one of the mediators. We have concluded a case, a major case. We have reported two Federal court decisions, it was on its way to the third circuit, and without the mediation, I am not sure it would have ended the way it did, and as early as it did, after those two reported cases where legal issues were decided.

I think the experience, and I don't have all the statistics, perhaps Judge Simandle can help you better, but I think that, even though not all the matters sent to mediation have been concluded in this first year or so of operation, I don't think anybody is dissatisfied with the process. It helps get over being told your case is being assigned to mediation.

Again, the initial mediations were done without charge by the lawyers. Now there is some nominal sum, much the way we are doing court-annexed arbitration. You get over the reticence of people to talk. The one I mediated was a $200 million dispute, not somebody's fanciful imagination, somebody already paid that, and now they are trying to get it back from their insurance company on a toxic waste situation.

They hadn't talked to each other in 4½ years of litigation. It started in Pennsylvania and it was sent to New Jersey. They hadn't talked to each other about anything except "Where are the answers to interrogatories, and the documents, and what-have-you?"

A motion for summary judgment was pending. When I asked to see it, in order to understand the case, two file drawers were delivered to me, one for each side, and they hadn't talked to each other.

When we were through, and we didn't settle that case because there was a peculiar legal issue that has to be decided, but before we were through, there were millions of dollars on the table, not $200 million, or the case would have been over, but from zero to millions is some significant progress.

Mr. HUGHES. And that is because, again, lawyers get very busy, and they don't focus in on a particular case until they are forced to do that. Sometimes that is 4 days before trial, and they have to start thinking in terms of scheduling their expert witnesses, and other things that need to be done to prepare for that trial. Quite often the threat of impaneling a jury is the only thing that brings them to the table, but at least, with alternative dispute resolution early in the process, you get them talking, and you have a far better chance before expenses are built up to try to resolve that dispute.

Frankly, there is no question but that the work that has been done, particularly in the last decade, in alternative dispute resolution, has, I think, made a real difference in our system of justice.

Let me ask you just one more question, Mr. Raven. You allude in your testimony several times to the corporate pledge. Has there been any evaluation of whether the pledge had kept the participants from suing one another?

Mr. RAVEN. Well, there was a discussion of that at the spring meeting of the Center for Public Resources, how effective is the pledge, should it be more effective. Sure, it should be more effective, sometimes you have a corporation that enters the pledge through its chief executive officer, and the general counsel doesn't

find out about it. Well, that is not very helpful. So some of it does fall between the cracks, but I think there is going to be—I think it has been quite effective, and I think the law firm pledge has been extremely effective because, you know, it enables the people that are interested in alternative dispute resolution in the firm to say, "Listen, we have signed this pledge, you know, we have to see that our lawyers are brought up to speed and know about it, and we have to be involved in this."

Mr. HUGHES. But have any studies been conducted that would show just how successful that program has been?

Mr. RAVEN. I don't think there have been any studies, although I am sure if you asked Jim Henry who runs the CPR he would have some statistics at his fingertips.

There is another way of using it, too, if I may just take a minute. I was brought into a case late up in Seattle, a Federal case, and the plaintiff's lawyer was pushing for an early settlement conference, and I looked at the letterhead of the Center for Public Resources from the executive committee, and I noticed on there with me as the general counsel of this plaintiff company, and I knew that they had never made an approach to our company.

So, when I made my argument to the judge, I said, "You know, both these parties have signed the CPR Corporate Pledge," and I explained to him what it was, and while I was talking, he was writing, and when I ended up, he said, I am making an order that both counsel report back to me within 10 days, they will talk to their respective general counsel, and they will tell me what kind of arrangement have been made to meet and do this.

Within 10 days, the general counsel had met and they settled this case, and we would have moved it out of the Federal court. We would have made them put it in the State court, because they didn't really have Federal jurisdiction, and $3-$400,000 could have been run up, and instead these people did what they should have done, they were brought together by that pledge, really, and a judge saying, hey, wait a minute, you have this pledge, and it worked.

Mr. HUGHES. Let me ask you, with regard to the law firms that have signed the pledge, if a client comes in and wants to sue one of the 600 companies that have signed the pledge, would the law firm take the case?

Mr. RAVEN. If the law firm saw that their client had signed the pledge, they ought to bring it very forceful to the attention of their client that they had, and if the other party had also signed it, that they ought to be carrying it out, and I am sure that the officers of the client would be glad to know that because it is an embarrassment if they don't check that out.

Mr. HUGHES. So your general understanding is that the pledge does have some impact?

Mr. RAVEN. Yes.

Mr. HUGHES. Thank you very much.

Mr. STURTZ. Mr. Chairman.

Mr. HUGHES. Mr. Sturtz.

Mr. STURTZ. Just one more thought for you, you would be interested, I think, in New Jersey, the New Jersey State Bar Association adopted a resolution before the pledge became the pledge. In-

deed, Mr. Raven was so cognizant of it, and had his finger on every pulse that he did not hesitate to call me at a time when he didn't know me. I think he was still president of the ABA at the time. He sought out the language of what the New Jersey State Bar did, the identical language of the pledge. So you have a whole state bar association which is signed on, if you will, to the pledge.

I will tell you that as late as Thursday of last week, in a department meeting that I attended in my office of litigating lawyers, not brought up by me, our chairman talking to all the new lawyers who are coming in, said, "You know, one other thing we have to deal with, we are signatories to the pledge, as are 36 other very highly respected law firms in New Jersey, the names of which you would immediately recognize, so, therefore, we have that responsibility to deal with the pledge in our litigation practice."

So I suspect it is being done throughout the country.

Mr. HUGHES. I congratulate both of you on your yeoman's work. Thank you for your testimony, it has been very helpful, and that concludes the hearing.

The subcommittee stands adjourned.

[Whereupon, at 11:56 a.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX 1.—NEWS ARTICLE BY STEWART L. LEVINE, "'SILVER FOXES': TRADITION AS AN ALTERNATIVE," THE RECORDER, APRIL 15, 1993

By STEWART L. LEVINE

In a 1986 address to the American Law Institute, former Chief Justice Warren Burger said that the true function of the legal profession should be to gain as acceptable result as the fairness possible balanced with the least amount of stress and at the lowest possible cost to the client.

For the past year, I have been researching the work of those I call "Silver Foxes." They are trained advisers, attorneys who practice the art of resolution. Their most distinguishing standard is taking care of the resources of others as if they were their own. They focus on resolution, on the process, so they quickly, efficiently and

Alternatives and Traditions

creatively carry out their missions of resolving claims to maximize the businesses of their lives. They have been working this way for many years. They have very healthy practices.

Through observing them I have come to define resolution as the conclusion of the parties and their resources after a conflict has been settled. After listening carefully to their stories, I believe that our present difficulties as attorneys are rooted in losing touch with the leadership and competence of their noble traditions. While many lawyers struggle, the Silver Foxes business is booming.

REPAIRING THE BREAKDOWNS

The core competence of the Silver Foxes is their ability to lead parties to address the ultimate source of their conflicts: the breakdowns in their working relationships. These breakdowns expose the ability of the parties to coordinate with each other, and without coordination productivity stops. Silver Foxes operate from the principle that their job is to lead parties to restore their coordination with more effectiveness. The Silver Fox's duty is to guide the parties back to productivity.

The Silver Foxes know that the key to our current professional crisis is that most attorneys are ensnared in their own process, not in resolution of the client's conflict. Individuals and attorneys often choose to prepare for war first. That is part of our American "rugged individual," "Marlboro Man," "Lone Ranger," "Conquer the West" culture. Parties — themselves or with the help of willing gladiators — posture, threaten, incite, delay and escalate from an adversarial position. They take delaying actions and often disturb themselves from the conflict. Even though cases are "settled" (in common thinking, everyone compromises and loses) on the courthouse steps, the resources squandered and opportunity costs are so enormous, never-to-be-recovered waste of individual and collective human and material capital.

'Silver Foxes' are wily senior practitioners who profit by cutting quickly to the bottom line of disputes. They keep business coming back by emphasizing resolution over process, and by churning out results rather than billable hours.

A COMPLETED OVERVIEW

The present concerned states because of fundamental changes that took place in the 1960s and 1970s:

• The flowering of the law firm, culture of the billable hour," that present attorneys in conflict with their clients.

• The ballooning of the body of statutory and case law that renewed specialists that focused on one law, not the people.

• The "legal lottery system" of a class of cases that makes it worthwhile to roll the dice.

• The service of large law firms with business management structures that needed the predictable revenue streams generated from billable hours for survival.

The predicament on which we are trapped is very hard to access because:

• Attorneys serve a conflicting personal interest in perpetuating the system: As long as the disputed continues, they continue to bill for their time. The game most lawyer's play is client process, not resolution — and they bill client to pay for process, not results. No business in the world does that; as a result of these practices the legal professions is facing the threat of their clients not valuing what they have to offer.

• Attorneys are unable to see how they participate in the loop because they are unable a professional discourse that says what they are doing is right and appropriate; most are mentally blind to what someone outside of the profession can observe.

The Silver Foxes claim that we have dulled our standards of professionalism. If you go to a surgeon for a cataract problem and afraid an examination, you'll probably have some surgery. So it is with going to a lawyer for many kinds of problems. Nevertheless, at last because of the need for business, attorneys will do their "classic" work not looking first at a less invasive intervention.

POWERS OF COMMUNICATION

Silver Foxes know that conflict is not a call for more, it is a call for resolution. Conflict is a urge that more communication for the sake of effective coordination is required to surface and address all the underlying concerns. This takes place through mastery in conversation. Effective communication is essential. Silver Foxes know that if all concerns can be surfaced and addressed directly it will lead to fruitions of those effective outcomes because all factors were considered. Silver Foxes are experts in overcoming foul disclosures, which is a primary impediment for resolution.

Examining conflict is almost always a path which evades dealing with certain most vulnerable concerns. This happens for any one of a number of reasons: fear, not knowing what the real issues are, hoping fools, and looking to place blame elsewhere, to name a few. The Silver Fox discerns concerns two core messages: 1) acrimony is usually a waste of energy, time, money, emotions and property — precious human resources; and 2) the only way conflict is truly resolved (defined as parties returned to coordination) is to deal directly and thoroughly with all relevant issues.

Because of the enormous legal expenses that prevails on "value scales" in the client's mind, clients because players are dismissing that the legal professions are [illegible] toward destructive disposal resolutions. ADR consists of a number of processes which are considered alternatives to traditional legal process and its complex procedures and rules of evidence. These traditional processes produce delay, often obscure truth, and prevent parties from taking the most vulnerable aspects of their story. These vulnerable aspects are almost always the place in which resolution can be found.

A Fox I spoke with recently couldn't understand why lawyers would ever think their clients should willingly pay for extensive "discovery" of all aspects of a case when business decisions with much greater financial consequences are usually made with much less information. The same Fox made the observation that by doing 20 percent of what might be considered ordinary discovery he gets 80 percent of the information, which is much more than needed in most cases. Clients certainly appreciate this style of practice. The genius of the Silver Foxes is that they are masters at keeping the resolution simple: why "complicate" when you can just talk?

The Silver Foxes resolve matters with [illegible] discussion after grounded analysis and due diligence. For them litigation always has been the last resort. In the Japanese culture, a [illegible] another way of saying that process has failed. That is a principle the Silver Foxes adhere to.

FOSTERING CLIENT RESPONSIBILITY

If lawyers want to regain their status as leaders and trusted advisors, they must give back to their clients the authority and responsibility for resolving differences. The current attitudes and standard practices of the profession encourage people to abdicate to professionals and hide behind "required procedures."

If clients take personal responsibility for their cases, they can more readily go to the root of what is not working and causing breakdowns or [illegible]. When clients abdicate personal responsibility, it becomes much harder for the attorney to identify the source of the conflict. This is where most lawyers get sidetracked into focusing on legal principles. Effective resolution usually becomes impossible because the issues that require are close to be the most vulnerable will not get addressed because the issues has shifted to legal issues. When you can keep the client focused on those vulnerable concerns, and talk about them thoroughly, then resolution will happen.

Unfortunately, most of what lawyers read about in the areas of conflict resolution is about process. Little is said about the overview the rules of conflict, and how to use it to enhance the productivity of coordinated action. A young, innovative Silver Fox in a large firm became enamored of alternative processes, and custom designed a unique procedure for an investment case of an important client. His partners were concerned about looking weak and the loss of the billable hours. However the process worked, the case was resolved quickly and elegantly, and the client is on board for life and keeps sending more matters and referrals.

It is fascinating how the most able judges are able to discern matters essential concerns. They know how to honor and respect the opinions passions presented, and how to bridge both positions. They are part of a tradition that could accommodate and find a balance for competing concerns. Black/white, right/wrong, or win/lose were not the poses of inquiry; effective resolution was.

It is essential to reward the stand-on of resolution at the beginning of the conflict before resources are wasted. Looking for the quickest resolution from the start is the key to having a full stable of satisfied clients.

Practicing from a perspective of resolution will require some new skills, skills which were not learned in law school. The Silver Foxes can serve as valuable mentors and role models. We can use the wisdom in their traditions to once again become the "oil" that lubricates society's transactions. That was what the mentor of an esteemed Silver Fox told him that lawyers do — almost 50 years ago.

Stewart L. Levine is a private practice in Napa, where he specializes in mediations and facilitation in resolving disputes.

APPENDIX 2.—LETTER FROM CHIEF JUDGE JOHN F. GERRY, U.S. DISTRICT COURT, DISTRICT OF NEW JERSEY, TO RONALD M. STURTZ, ESQ., CHAIR, ARBITRATION COMMITTEE, SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION, APRIL 28, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
UNITED STATES COURT HOUSE
CAMDEN NEW JERSEY 08101-0588

CHAMBERS OF
JOHN F. GERRY
CHIEF JUDGE

RECEIVED
APR 30 1993

April 28, 1993

Ronald M. Sturtz, Esquire
Arbitration Committee Chair
Section of Litigation - American Bar Association
Hannoch Weisman
4 Becker Farm Road
Roseland, New Jersey 07068

Re: Extension of Court-Annexed Arbitration Act

Dear Mr. Sturtz:

On behalf of the United States District Court for the District of New Jersey, I am pleased to answer the questions posed in your letter of April 22, 1993, concerning our experience with mandatory non-binding court-annexed arbitration.

1. On balance, does your district support continuation of the arbitration program as a worthwhile method of Alternative Dispute Resolution ("ADR")?

   Answer: Yes, our District strongly supports continuation of the arbitration program. If the program were discontinued it would be a major blow to our District's efforts to reduce cost and delay of civil cases.

2. Do you find that there is litigant satisfaction with the arbitration process, or do litigants view arbitration as a form of second class justice?

   Answer: From all reports, there is an exceptional level of litigant satisfaction with the arbitration process. Our Magistrate Judges, as well as the District's Lawyers Advisory Committee, closely monitor the Arbitration Program. We have not heard a single complaint that parties to an arbitration regarded the program as "second class justice." We believe that the degree of satisfaction remains high and is growing, as evidenced by the substantial growth in numbers of cases which have voluntarily assented to being placed into arbitration. The number of cases placed in arbitration

in our District grew from 1,154 in 1991 to 1,694 in 1992. This represents almost a 47% increase in Arbitration cases. Because the number of cases within the mandatory arbitration categories have risen only slightly, the bulk of the increase is from voluntary cases.

3. Do you find that there is attorney satisfaction with the arbitration process?

Answer: There is a high degree of attorney satisfaction with this process. The success of the Arbitration Program induced the lawyers on our Civil Justice Reform Act Advisory Committee in 1992 to propose an expansion of this District's alternative dispute resolution programs, to embrace a new program of Mediation for complex cases. This could not have happened if there was any significant attorney dissatisfaction with the Arbitration Program. The Court adopted the lawyers' proposal on December 22, 1992, promulgating the new Mediation Rule, in General Rule 49.

4. What negatives, if any, have been perceived about the arbitration program; are they significant?

Answer: We have been responsive in improving the program since its inception in March, 1985. On essentially an annual basis, we have amended the Arbitration Rule to meet these concerns. For example, to address a complaint that some arbitrators were failing to give reasons for their awards, we amended the rule to require them to do so. To address concern that some parties were holding back on completing discovery in order to see how well they fared in the Arbitration hearing, we amended the rule to preclude such reopening of discovery after Arbitration absent exceptional circumstances. When some parties complained that their adversaries gave only a half-hearted effort and then demanded trial de novo after the Arbitration, we amended the rule to reinforce the requirement of participation in good faith by empowering the Arbitrator to recommend sanctions to the District Judge. Of the approximately 9,000 cases placed into the program since 1985 in our District, fewer than five have required judicial intervention to police the requirement of good faith participation. We view none of these problems as significant.

5. Would your district recommend to other districts the adoption of mandatory arbitration (but not binding as under your program) as part of their reservoir of ADR

options?

Answer: Yes. We would also be happy to work with other districts in showing them how our program works.

6. Has your district had any difficulty in providing competent arbitrators to conduct assigned proceedings?

Answer: No. My predecessor, Chief Judge Clarkson Fisher, appointed the original panel of 300 arbitrators. We have been blessed with high level of interest among experienced litigators who wish to become arbitrators. The better attorneys see this duty as a way to contribute a measure of public service. Many arbitrators have told me that their experience as arbitrators has resulted in their sharpening of skills as litigators. It is not an easy job to sit as an arbitrator, because one must bring the same skills to the hearing as a non-jury judge does.

7. To the extent that arbitration awards have been formally rejected for de novo court proceedings, do you have any information to support a view that arbitration, nevertheless, facilitates ultimate disposition of cases?

Answer: Yes. When a request for trial de novo is filed after arbitration, the case goes back to the Magistrate Judge having pretrial responsibilities in the case. The Magistrate Judges report to me that even among this group of cases, it is most common for the matter to settle at the Final Pretrial Conference or before trial. Even where a party rejects the arbitrator's award, it is most common for that award to become a benchmark for further negotiations and to facilitate the final settlement. This benchmark draws its authority from the fairness of the process, the neutrality of the arbitrator, and the integrity of the arbitrator's decision.

8. Please provide us with any other information you feel will be useful in our presentation to the House Judiciary committee concerning the passage of H.R. 1102.

Answer: The District Judges and Magistrate Judges, to the best of my knowledge, continue to be unanimous and enthusiastic in their support of the Arbitration Program. For litigants, the program leads to a more efficient resolution of their controversy. We are able to provide in every arbitration case a trial-like hearing that is unavailable in other cases except by

trial itself. Our experience over these eight years of the Arbitration program reflects that approximately 1% of the Arbitration cases end up having to be tried to a verdict. Non-arbitration cases, on the other hand, are approximately 4 times more likely to require trial to a verdict. We believe, in short, that we are providing an extra measure of justice to cases in the Arbitration Program that is unavailable to other cases. The success of the program reflects the hard work of the arbitrators and the diligent efforts of litigating counsel.

Thank you for your interest in this subject. Any further questions in this regard may be addressed to the Honorable Jerome B. Simandle, U. S. District Judge, in Camden.

Sincerely,

JOHN F. GERRY
Chief Judge

APPENDIX 3.—LETTER FROM CHIEF JUDGE THELTON E. HENDERSON, U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, TO RONALD M. STURTZ, APRIL 28, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO, CALIFORNIA 94102

THELTON E. HENDERSON
CHIEF JUDGE

BY FAX: (201) 994-7197

April 28, 1993

Ronald M. Sturtz
Hannoch Weisman
4 Becker Farm Road
Roseland, New Jersey 07068

Dear Mr. Sturtz:

This is to respond to your April 22, 1993 letter regarding the Congressional hearings on the extension of the Court-Annexed Arbitration Act, 28 U.S.C. § 651. et seq.

As our district strongly favors continuation of our Court-annexed arbitration program, I am delighted to learn that you will have the opportunity to support extension of the Act at the upcoming hearings.

I have attempted to answer the questions you posed in your letter to the best of my ability, given the shortness of time. I have also added some additional thoughts that you may find useful. Of course, please do not hesitate to let me know if I can assist your efforts in any other way.

1. On balance, does your district support continuation of the arbitration program as a worthwhile method of ADR?

The answer to this is a resounding "yes." I believe our court-annexed presumptively mandatory arbitration program provides a valuable service to litigants by providing a fair and cost-efficient alternative to the substantial delays and formidable expense that is typically involved in getting a civil case to trial. As I discuss further below, the program has been very positively received by judges, counsel, and litigants. Its discontinuation would be a great disservice to our litigants, and leave a gaping hole in our umbrella of court sponsored ADR programs.

2. Do you find that there is litigant satisfaction with the arbitration process, or do litigants view arbitration as a form of second class justice?

I believe that litigant satisfaction in our district is very high overall, and that few litigants who have participated in the arbitration process would describe it as a form of "second class justice." My informal assessment is borne out by the Federal Judicial Center studies which show that, in our district, 90 percent of litigants reported an understanding of what was taking place, 85 percent felt that the entire process reflected in the arbitration track was fair, and that the hearing itself was fair, and 78 percent felt that the hearing provided a good chance for their side of the story to be told. My guess is that if a similar survey was taken after jury trials, our arbitration program would compare most favorably. Significantly, in my twelve plus years on the bench, I have yet to receive a complaint from any litigant concerning the arbitration process.

3. Do you find that there is attorney satisfaction with the arbitration process?

Yes, I believe that the vast majority of attorneys who have been assigned to the arbitration track are satisfied with the process. Again, the Federal Judicial Center studies support this view. They show that 80% of attorneys surveyed support the arbitration program in the Northern District, and court-annexed arbitration in general. Further, almost 95 percent of lawyers who have gone through arbitration hearings in the Northern District report having been given adequate time at the hearing to present all necessary evidence, 93 percent agreed that the procedures were fair, 87 percent agreed that the arbitrators were fair and impartial and 72% percent reported that the arbitrators were prepared for the substantive proceedings.

4. What negatives, if any, have been perceived about the arbitration program; are they significant?

I do not believe that any significant segment of our bench or bar perceives any serious negatives about our arbitration program. However, I am aware that there are those who perceive certain negatives about court-annexed arbitration programs in general. I have attempted to address some of those concerns below.

5. Would your district recommend to other districts the adoption of mandatory arbitration (but not binding as under your program) as part of their reservoir of ADR options?

Yes, I would strongly recommend adoption of presumptively mandatory arbitration programs in other districts.

6. Has your district had any difficulty in providing competent arbitrators to conduct assigned proceedings?

Our district has not had problems finding sufficient numbers of competent arbitrators.

To help ensure competency, lawyers are not added to the pool unless they have been admitted to practice at least 10 years, are admitted to practice in the district court, and either (i) have committed for not less than five years 50 percent or more of their professional time to matters involving litigation, or (ii) have had substantial experience serving as a 'neutral' in dispute resolution proceedings, or (iii) have had substantial experience negotiating consensual resolutions to complex problems. N.D. Cal. Local Rule 500-4(a).

7. To the extent that arbitration awards have been formally rejected for de novo court proceedings, do you have any information to support a view that arbitration, nevertheless, facilitates ultimate disposition of cases?

Yes. The studies of our district suggest that even when a party files for a trial de novo, it is often done simply to preserve rights, and that the case usually settles thereafter. I believe that these subsequent settlements are significantly facilitated by the arbitration because the arbitrator's decision, and the arbitration itself, provides each side with extremely useful guidance regarding the value and strength of their case. This, in turn, better enables the parties to successfully negotiate a settlement from an informed position. Thus, it is not surprising that although requests for trial de novo are filed in 60% of arbitrated cases, 90% of these cases settle prior to trial.

8. Please provide us with any other information you feel will be useful in our presentation

You are no doubt receiving advice and information from many quarters; however, I would encourage you to underscore some or

all of the following points in your testimony, as you deem it appropriate:

1. The term "Mandatory Arbitration" suggests an extremely rigid program which requires parties to arbitrate their cases without exception. In reality, however, parties may seek exemption from the arbitration track whenever particular circumstances make arbitration of their case inappropriate.[1] Thus the term "mandatory arbitration" is not only inaccurate, but it portrays such programs in an unnecessarily negative light. A more precise and favorable description would be "Presumptively Mandatory Arbitration." I would encourage you to explain this distinction and utilize the term "presumptively mandatory arbitration" in your remarks.

2. The primary impetus for court-annexed arbitration programs was to provide a more satisfactory and cost-effective service to litigants with smaller contract and tort cases, which can often get buried in federal courts consumed with heavy complex criminal and civil cases. The fact that such a program might also reduce caseloads was clearly a secondary consideration, as is explained in detail in an article by our Magistrate Judge Wayne D. Brazil.[2] Thus, while opponents may seek to depict arbitration programs as motivated by selfish concerns, this is historically not the case.

Also, experience has also shown that the arbitration programs only affect a relatively small percentage of the court's docket. Thus, docket reduction is clearly not a significant factor in our court's desire to continue our arbitration program.[3]

3. One of the key ways that a presumptively mandatory arbitration program delivers a better service for litigants is by providing an earlier "point of decision." Smaller, non-complex tort and contract cases (which make up the bulk of cases that are assigned to the arbitration track), are often eventually resolved through

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[1] Our Local Rule 500-3(c) specifically provides that parties may notice a motion for removal from the arbitration program, and that the assigned judge may, in his or her discretion, exempt an action where a party has demonstrated the existence of complex questions of law or fact or other grounds for finding good cause.

[2] That portion of his article discussing court-annexed arbitration programs will be sent under separate cover.

[3] During the program's first twelve years, the number of arbitration hearings averaged about 60 per year.

settlement, regardless of whether they are assigned to arbitration or not. However, experience shows that attorneys do not usually devote the necessary time, energy, and expense required to fully evaluate their cases -- a prerequisite to settlement -- until a firm trial date is close at hand. Presumptively mandatory arbitration programs provide just such a firm "point of decision" much earlier in the life of a case -- often up to a year earlier in our district. This earlier date in turn drives an earlier settlement, thus enabling many plaintiffs to receive their settlement proceeds much sooner than they would absent an arbitration program.

4. Opponents of presumptively mandatory arbitration argue that arbitrations are inferior to trials, and therefore litigants assigned to an arbitration track are receiving second class justice. However this "arbitration" v. "trial" dichotomy does not hold up under scrutiny because it is based on the fallacy that litigants who are not assigned to arbitration will in fact go to trial. The reality, as noted above, is that the smaller tort and contract cases that make up the bulk of the arbitration program will usually settle prior to trial, if they are not assigned to arbitration. Thus, the notion that litigants are trading in trial rights for inferior arbitration rights does not stand up when examined in light of real world circumstances. Indeed, given the likelihood of settlement, a truer comparison would be between an arbitraton (which does provide for client participation and a "day in court"), and the settlement process (wherein the client has no meanginful direct participation). Under this more accurate comparison, litigants actually fare better when they are assigned to an arbitration track.

5. There is no empirical evidence that I am aware of that would support the notion that arbitration yields significantly lower awards for plaintiffs. In our district, only 33 out of 63 plaintiffs who pursued a trial de novo achieved any improved result at all. And of these, many only improved their position marginally -- by $10,000 or less. Thus, approximately 2/3 of the parties who demanded trial de novo failed to improve their position sufficiently to make the cost of a trial worthwhile. Also notable is that 21 percent of those who had a trial de novo received a less favorable judgment after trial.

6. Voluntary court-annexed arbitration programs are not a viable alternative because they generally draw little or no participation. However, this is not because lawyers or clients find arbitration, itself, to be of little value. Rather, as I discuss above, lawyers and clients who have been assigned to an arbitration track are overwhelmingly positive about the

experience. Rather, as might be anticipated, counsel are hesitant to take the responsibility of advising a client to go forward with an arbitration, when it is not court ordered.

It is also worth noting that those "voluntary" programs that achieve any degree of success are rarely purely voluntary. Rather, they generally involve at least some form of quasi-pressure from the judges (for example, a judge at a status conference strongly suggesting that the parties should submit to arbitration).

I appreciate the opportunity to contribute the above thoughts, and hope they are useful to your preparations. As mentioned above, our Magistrate Judge Wayne Brazil has written an extensive article on presumptively mandatory arbitration programs, which speaks more eloquently than I on many of the points made in this letter. I am sending a copy of this article by separate cover and encourage you to make use of it in whatever way you can. I am also enclosing a booklet that describes the ADR Procedures in our Court.

I wish you the best of luck on Capitol Hill!

Sincerely,

Thelton E. Henderson,
Chief Judge

APPENDIX 4.—LETTER FROM CHIEF JUDGE RALPH G. THOMPSON, U.S. DISTRICT COURT, WESTERN DISTRICT OF OKLAHOMA, APRIL 26, 1993

United States District Court
Western District of Oklahoma
United States Courthouse
200 N.W. 4th Street
Oklahoma City, Oklahoma 73102

Ralph G. Thompson
Chief Judge

Telephone
405-231-5153
FTS 736-5153

April 26, 1993

Ronald M Strutz, Esq.
HANNOCH WEISMAN
4 Becker Farm Road
Roseland, NJ 07068

RE: H.R. 1102, Extension of Court - Annexed Arbitration Act,
28 U.S.C. §651, et seq.
CONGRESSIONAL HEARINGS - MAY 5, 1993

Dear Mr. Strutz:

The United States District Court for the Western District of Oklahoma is most supportive of it's court-annexed, mandatory but non-binding, arbitration program. This court has utilized the procedure since 1985 with good success. We hope the following answers to your questions will be helpful in your presentation at the Congressional hearings.

1. Our court supports continuance of arbitration programs and finds them worthwhile. Non-binding arbitration, both mandatory and consensual, has become an integral part of the litigation process in our court. Attorneys who practice here regularly plan for it and build it into their litigation case management and often rely on being put into mandatory arbitration to speed up the settlement process. Used as an early settlement encouraging program (rather than a replacement for the trial as in some other courts), our program emphasizes the setting of a hearing before full discovery for the trial of the case is completed, thereby streamlining discovery for arbitration hearing purposes and saving costs. It stresses early communication between the parties on the essential issues on each side of the dispute. It is now one of four court-sponsored ADR procedures available in the Western District, offering an alternative to early mediation, the summary jury trial and the magistrate judge-hosted settlement conference. Non-binding arbitration with the clients present is a good combination of the adversary/adjudicative process with a settlement approach. With attorneys making presentations, the attorney can feel in control of the case. At the same time, the process allows the client a better perspective of the case. Not only is it an incentive for early settlement but the process can narrow issues and thereby help direct remaining discovery. The award can be a trial predictor or can be useful for beginning or continuing negotiation. If the award is accepted or the case settled, costs of the full trial are saved.

2. Litigant surveys and other comments are generally favorable to the process. According to the Federal Judicial Center survey of our court, over 80% of the litigants who experienced non-binding arbitration in this district agreed that the process was fair. In this Court there are no known comments concerning "second class justice." In fact, comments generally are that litigants favor early arbitration in an attempt to save costs and like the attention given to their case by both the court and the neutral arbitrator.

3. Attorney satisfaction has been shown also through surveys and many comments to court staff. Over 80% of the defense attorneys and 90% of the plaintiff's bar approve both the concept and the specific program in this district according to the Federal Judicial Center survey. The more recent Civil Justice Advisory Group survey collected by our court's Civil Justice Advisory Group indicated satisfaction due to the program's ability

to "facilitate settlement." Attorneys in our district also like being a part of the arbitrator selection process. Through the years attorneys have stated over and over it is the early setting of the hearing that causes the necessary discovery to be done to get the case settled.

4. In regard to "negatives," resistance to new concepts and to change is always to be expected. Our arbitration program was the first of its kind in either the state or federal courts in the state of Oklahoma. Generally, most negative comments have not been that significant. Attorneys select the hearing date so complaints of setting too early for sufficient discovery can be discounted. Wanting the judge to rule on a motion for summary judgment rather than settle is often heard. Extra cost if the case does not settle is obvious but often issues are narrowed or better trial preparation results. Awards can polarize parties but more often it gives them an evaluation or opinion by a well respected attorney. And, if arbitration is held in conjunction with other settlement techniques such as a settlement conference, the results can still be beneficial.

5. Because parties can always request to be exempted from the program and because a full trial on the merits is always available on demand, the mandatory aspect of our program has never really caused any problems. Many attorneys (for both plaintiffs and defendants) have stated that the court-ordered aspect has been very beneficial to settlement discussions, especially when stubborn or unrealistic clients are involved. Mandatory or court-ordered programs also relieve one side from any appearance of weakness by requesting a settlement procedure. Because we began with a mandatory program, many attorneys as well as litigants, have become familiar with the program and its benefits who might otherwise not have chosen to try it. Now they often request to use the process. This adjudicatory ADR tool is far less expensive to use than the summary jury trial and when a court makes available several ADR options such as mediation or the settlement conference (facilitated or assisted negotiation), it rounds out the choice of the several settlement processes and thereby increases access to civil justice through the courts. The Civil Justice Reform Act virtually mandates federal district courts to include ADR in their expense and delay reduction plans. Courts cannot afford to set up programs with staff, forms and procedures and not have them used, especially when these mandatory programs have been tried successfully.

6. Originally, our judges selected and approved over 300 well respected members of the bar to the arbitrator panel. Since then, we have always had a waiting list of attorneys who wish to be appointed to the panel. It has become quite prestigious to serve. Comments by attorneys and litigants over the years are generally that the arbitrator was competent, fair and well prepared. We do exempt attorneys on the arbitrator panel from service under the Criminal Justice Act if they so request, and always provide training when any new group is appointed to the panel.

7. Arbitration, or for that matter any early ADR procedure where the parties come together and share or explain their version of the facts and the law, can begin the communication process that can lead to settlement. This is verified through many conversations of our ADR staff with our arbitrators, mediators, the settlement conference judge and attorneys who have participated in these processes. The award itself stimulates settlement discussion. If a case that has been through arbitration in our court reaches the judge hosted settlement conference stage that our court requires shortly before the actual trial, the settlement conference magistrate judge, with the parties permission, utilizes the arbitrator's expertise and his or her award to stimulate further settlement discussions. Our statistics have shown that since program inception, of all the cases that have actually held an arbitration hearing and requested a trial de novo, only 5% have ever gone to trial. However, the real significance of these arbitration programs is not in whether or how many cases demand de novo trial or go on to trial, but in how many don't; its significance is in how many settle on the eve of the hearing date or shortly thereafter. To us, that measures the true worth of these programs. They encourage early settlement and thus save costs. (see attached excerpt from the Alternative Dispute Resolution End of Year Report for 1992 for the United States District Court for the Western District of Oklahoma concerning Court-Annexed Arbitration).

2. Funding for payment of our arbitrators' fees depends on the extension of these programs beyond the sunset date. These funds, and the assignment or provision for court clerk staff to handle the paper work associated with these programs, are at the heart of the success of these programs from an administrative perspective. There are no complicated collection procedures to pay arbitrator fees. Cases move promptly through the process with the staff assistance. Also, government cases assigned to arbitration with the U.S. Attorneys' office involvement are facilitated by the way these programs are currently set up and funded.

Our experience with the arbitration programs in the existing courts for both mandatory and voluntary programs allowed under the 1988 Judicial Improvements Act has been entirely favorable. This court would welcome an extension of the programs. Please contact our ADR Administrator and law clerk, Ann Marshall, (405-231-5821) if you have any questions or if we can be of any further assistance.

Yours truly,

Ralph G. Thompson
Chief Judge

RGT:am

Attachment to Sturtz letter

EXCERPT FROM ALTERNATIVE DISPUTE RESOLUTION END OF YEAR REPORT FOR 1992 FOR THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA CONCERNING COURT-ANNEXED ARBITRATION:

In calendar year 1992, court-annexed arbitration, the summary jury trial and the magistrate judge-hosted settlement conference continued to assist with earlier and less costly disposition of civil cases. The addition of the Civil Justice Advisory Group's recommended early mediation program has supplemented these other procedures offering an even earlier and more cost effective settlement process to all litigants. This report gives statistics for the mediation program for its first year and for arbitration and the summary jury trial for the past 3 years for a clearer idea of their performance and utilization.

Court-Annexed Arbitration. Although certain cases fall within the "jurisdictional amount" for mandatory arbitration, most Judges are allowing counsel to choose whether arbitration or mediation would be most appropriate for their particular case at the initial status/scheduling conference if early ADR is warranted. In 1992, 201 cases were referred to non-binding arbitration (150 fell into the mandatory category and 51 voluntarily requested the program.) Only 7.8% of the calendar year caseload utilized this track, down from 16% in 1991 and 11% in 1990. The fluctuation in civil caseload numbers as well as allowing counsel to choose between arbitration and mediation may partially explain the percentages in caseload change but actual numbers are not all that different. Although 188 arbitration hearings were actually set and scheduled, only 92 hearings were held due to the early disposition nature of this process. (96 cases never reached hearing with many settling on the eve of the hearing.) Hearings are normally scheduled well before the discovery cutoff date. Of those cases that held hearings, only 54 requested a trial de novo, the remaining 38 either accepted the award (10) or settled with the aid of the arbitrator's award. Compared to 1991 and 1990, there were 190 referrals in 1991 and 223 in 1990; 130 cases actually held hearings in 1991 and 89 in 1990; 69 requested to go back to the trial track in 1991 and 39 in 1990. Although very few of the cases that utilize the arbitration process ever reach trial, the real significance is that the arbitration hearing deadline triggers early resolution just before or shortly after the hearing. Thus this program still is performing as it was designed and intended - to encourage early settlement.

APPENDIX 5.—LETTER FROM DAVID L. EDWARDS, CLERK OF COURT, U.S. DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, TO RONALD M. STURTZ, APRIL 29, 1993

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Office of the Clerk
311 West Monroe Street, Room 110
P. O. Box 53558
Jacksonville, Florida 32201

David L. Edwards
Clerk
(904) 232-2804

April 29, 1993

RECEIVED
MAY 03 1993

Mr. Ronald M. Sturtz
Hannoch Weisman
4 Becker Farm Road
Roseland, NJ 07068

Dear Mr. Sturtz:

Since Chief Judge Moore was preparing to leave for a national conference of Chief Judges when your letter arrived, he asked that I respond on his behalf.

By way of personal background, I was the Chief Deputy Clerk of this Court when the judges voted to adopt a mandatory court-annexed arbitration program in 1984 and, as such, was very much involved in its implementation. I also undertook some early in-house evaluations of program progress and worked closely with the Federal Judicial Center in their comprehensive survey of our program. I was appointed Clerk of Court in January 1990 and have continued to monitor and evaluate the arbitration program--most recently in conjunction with our Civil Justice Reform Act Advisory Committee study of the court's civil case management practices.

I shall address the topics addressed in your letter in the order in which presented.

1. On balance, the district does support continuation of the arbitration program. My office, which manages the program is overwhelmingly supportive. Among the nine active judges of the court, seven have voiced continuing support, one is neutral, and one appears slightly less than convinced of the program's overall value.

2. It is the opinion of our deputy clerks who manage the program, swear the panel attorneys, and regularly attend the hearings, that the majority of litigants view the program favorably--particularly since they are aware that the arbitration award is not binding and that the right to trial de novo can be exercised by either side. This current opinion is consistent with the earlier FJC finding that the majority of those litigants polled, supported the program.

3. It is my view, and that of our deputy clerk arbitration coordinators that while there is still general satisfaction expressed by attorneys, there is a growing preference for the court's formal mediation program which was adopted in 1989. Many attorneys appear to feel that the court should retain both programs while offering counsel the choice of the ADR program they feel best suits individual cases and clients.

4. During the recent CJRA committee discussions regarding the court's ADR programs, a few attorneys voiced displeasure with the fact that the arbitration program forces them to "play their hands" earlier in the life of a civil case than they would prefer. These were plaintiffs' attorneys (contracts/torts) who, while not advocating the use of the program with respect to their cases, joined in a recommendation that the program be expanded to include prisoner civil rights petitions.

5. In my opinion, the majority of this court's judges would recommend the adoption of mandatory arbitration to other districts in conjunction with other ADR mechanisms such as mediation. Arbitration, while mandatory by local rule with respect to specific classes of civil cases, is not binding on the parties. Additionally, the court will soon consider, as a recommended feature of its CJRA Plan, extending the arbitration/mediation option to counsel.

6. This district has had no difficulty in providing a panel of three competent arbitrators to each hearing. We currently have approximately 450 attorneys who applied for, and have been certified by the court as arbitrators.

7. While it is true that only 11 percent of arbitration panel awards are accepted by both parties at, or immediately following the hearing, we do have current data which demonstrate that the arbitration program does, indeed, facilitate ultimate disposition of civil cases.

A few weeks ago we analyzed the disposition rates for civil cases filed in the Middle District of Florida in calendar year 1991. This analysis revealed the following:

Filed 1/1/91-12/31/91	Closed by 12/31/92
4070 non arbitration cases	3168 (77.8%)
481 arbitration cases	424 (88.1%)

While it is clear that cases subjected to the arbitration process are being disposed of earlier than other civil cases (a major ADR goal), there are other program benefits not evident in these numbers which speak to the value of this program. Among the more notable are:

- only 3 percent of those closed arbitration cases reflected above were concluded at trial versus 6 percent of the closed non arbitration cases. The resultant cost savings to arbitration case litigants is obvious. Equally important is the fact that the saved bench time is devoted by the judges to the trial of other civil and criminal cases.

- the program is managed almost exclusively by the clerk's office, again conserving valuable judge time for the disposition of more criminal and non arbitration civil cases.

8. The ultimate yardstick by which arbitration, or any ADR mechanism, should be measured, is the degree to which it contributes to the overall "current" condition of a court's civil docket. In 1983, the year before implementation of this court's arbitration program, the Middle District of Florida judicial workload profile reflected the following:

Category	Number	National Ranking Among 94 U.S. District Courts
Civil filings per judgeship	443	59th
Terminations per judgeship	480	44th
Percentage of civil cases over 3 yrs. old	5.2%	51st

The court's workload profile for statistical year 1992 reflects the following:

Civil filings per judgeship	442	11th
Terminations per judgeship	512	11th
Percentage of civil cases over 3 yrs old	3%	22nd

As significant as these differences are, the 1992 statistics and rankings are dramatically more pronounced when considering that per-judgeship actions are based on authorized, not actual judgeships. In 1983, this court had only 7 vacant judgeship months. In 1992, the court had 25.2 vacant judgeship months--a shortage of more than two judges throughout the year.

The court attributes its success in disposing of more cases per judgeship and reaching an historic low in percentage of cases over 3 years old (despite one of the heaviest caseloads in the nation) to three factors:

- judges working harder and longer
- visiting judge assistance
- the arbitration program

I trust that this information will be of some assistance to you as you prepare for the May 5th hearings. Please call should you require any clarification or expansion of the information provided.

Sincerely,

David L. Edwards
Clerk of Court

DLE/vh

c: Chief Judge John H. Moore, II

APPENDIX 6.—LETTER FROM CHIEF JUDGE THOMAS C. PLATT, U.S. DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, TO RONALD M. STURTZ, APRIL 23, 1993

CHAMBERS OF
THOMAS C. PLATT
CHIEF JUDGE

United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, N. Y. 11201

PLEASE REPLY TO:
☐ BROOKLYN CHAMBERS
U.S. COURTHOUSE
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201
☒ UNIONDALE CHAMBERS
UNIONDALE AVE AT
HEMPSTEAD TURNPIKE
UNIONDALE, NEW YORK 11553

April 23, 1993

RECEIVED

APR 3 . 1993

Ronald M. Strutz
Hannoch Weisman
4 Becker Farm Road
Roseland, New Jersey 07068

Re: H.R. 1102
Extension of Court-Annexed Arbitration Act,
28 U.S.C. §651 et seq.
Congressional Hearings - May 5, 1993

Dear Mr. Sturtz:

In reply to the questions contained in your letter dated April 22, 1993:

1. Yes.
2. Yes (to the first part) and no (to the second part).
3. Yes.
4. None.
5. Yes.
6. No.
7. No specific information; however, we have only had a small number of de novo applications in the past 6 1/2 years.
8. Approximately 8% of our civil cases are handled in our arbitration program, and the very heavy case load of our District Court Judges is reduced accordingly.

I think all of our judges are pleased with our arbitration program and would favor the extension of the authorization.

Sincerely yours,

THOMAS C. PLATT
Chief Judge

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